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STRAHAN'S DIGEST OF EQUITY

SIXTH EDITION

BY

R. A. EASTWOOD, LL.D.

OF GRAY'S INN AND THE NORTHERN CIRCUIT,
BARRISTER-AT-LAW; PROFESSOR OF LAW
IN THE VICTORIA UNIVERSITY
OF MANCHESTER

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PREFACE.

STUDENTS of equity, in the present generation, have a wider choice of text-books than had their predecessors when the first edition of this work was published. Yet it would seem that none of the more modern publications can be called accurately introductions to the subject. That is the justification which is claimed for the re-issue of the present work. It assumes little more than an elementary knowledge of the law of Real Property ; it is not overloaded with facts ; and, therefore, it provides a suitable foundation for more advanced reading.

Recent editions, however, have been defective in several respects ; in particular the fifth edition took inadequate notice of the effects of the legislation of 1925. These defects I have endeavoured to correct, in a number of instances by completely re-writing the text.

R. A. EASTWOOD.

60, KING STREET,
MANCHESTER.

June, 1939.

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INTRODUCTION.

JURISDICTION OF CHANCERY.

ARTICLE 1.

Meaning of "Equity."

By equity is meant that body of rights and remedies which before 1873 were not recognised or provided by Courts of Law, but only by the Court of Chancery or by some other court exercising a similar jurisdiction.

It seems clear that in early times, even subsequently to the establishment of the three common law courts, relief in the nature of equitable relief was not infrequently given by them, and especially by the justices in eyre and the judges of what we would now call assize. Gradually all jurisdiction to grant such relief became concentrated in the Court of Chancery and the Court of Exchequer. The latter's equitable jurisdiction was abolished in 1842, when two extra judges were appointed to the Chancery Court, and much about the same time limited powers were conferred by Parliament on common law courts to give equitable remedies, such as injunctions, and on the Court of Chancery to give damages.¹ But after 1842 till 1873 none of the superior courts had a general jurisdiction to grant equitable relief except the Court of Chancery.

¹ See Chancery Amendment Act, 1858 (Lord Cairns's Act).

The Court of Chancery dealt only with civil matters.¹ The Star Chamber, however, has been called the court of criminal equity ; and undoubtedly it inflicted in its time punishments for acts and omissions which the courts of common law did not regard as criminal. The Star Chamber disappeared in the troublous times of the first Charles ; but until the Stuarts, with their usual imprudence, had caused it to be hated by using its powers to oppress their opponents, there is nothing to show that it was not as useful in criminal affairs as the Court of Chancery was in civil. This at least is certain, that after its abolition the Courts of Law found it judicious to adopt as part of the common law many of the offences which the Star Chamber had and which they had not previously punished. Criminal libel, fraud, perjury, and conspiracy are among those offences so adopted.

ARTICLE 2.

Authority by which Equity was created.

(1) The authority by virtue of which the Court of Chancery created those rights and provided those remedies arose out of the delegation to its head, the Chancellor, of the King's prerogative to afford to his subjects relief, where justice so required, in individual cases where the common law gave either no remedy at all or a remedy which was inadequate.

(2) Being matter of prerogative, no subject could claim as of right that such relief outside the law should be afforded him.

Paragraph (1).

This prerogative to grant relief outside the law was exercised by the King in Council (*Curia Regis*) and was

¹ Before Charles I. the Chancellor frequently dealt with criminal matters. In 1639, however, we find the court refusing to hear a case on the ground that it was "of a penal and criminal nature" (*Manning v. Freake*, Tothill 139).

associated with, and for a long time was not distinguished from, his duty to see that the law was enforced against any too powerful a subject who defied it. At first the exercise of this prerogative and the discharge of this duty were regarded as extraordinary matters, since justice in general was not administered by the King but by local courts. As the country became more settled and the central authority more powerful, the King's judges superseded the local courts, and the administration of the law became the ordinary business of the King in Council. When this change occurred, special committees of the Council—as they may be called—were appointed to enforce the law. These became the Courts of King's Bench, Common Pleas and Exchequer, and the Judges of Assize. The function of these, however, was merely to declare and enforce the customs of the realm and the Acts of Parliament—that is, the law. The prerogative to give relief outside the law remained in the King in Council. Gradually the exercise of this prerogative was transferred to another committee, over which the Chancellor, who was at once keeper of the Great Seal and keeper of the King's Conscience and a priest, presided. It is doubtful whether the Chancellor ever sat alone to exercise this prerogative before the time of Cardinal Wolsey. When that masterful man was Chancellor he constituted himself a court for this purpose, and also made his subordinate in the Chancery, the Master of the Rolls, an assistant court. From this day onwards these officials had jurisdiction to exercise the King's prerogative on this behalf and to hear applications for its exercise without the participation or assistance of members of the King's Council or judges of the common law.

Paragraph (2).

But though they were courts, they were not Courts of Law but Courts of Conscience whose function was to use the King's prerogative to interfere with the administration of the law in the interests of justice where conscience rendered such interference necessary. The relief given outside the law could only be given in respect of each case

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as it arose. The prerogative gave no power to the King or his representative, the Chancellor, to lay down a principle on which henceforth relief outside the law would be given. That would have amounted to repealing a law of the kingdom, and this Parliament had always denied the right of the King to do. So the function of the Chancellor was limited to granting relief outside the law in each individual case as it was brought before him.

This was the reason why long after the Law Courts were staffed exclusively by judges trained in the principles of the law, no professional training was thought necessary for the great office of Chancellor. No professional training was thought necessary because there were no principles to be learned upon which relief was to be given. In Charles I.'s time Selden could say without much exaggeration that equity depended on the length of the Chancellor's foot; and even in Charles II.'s time a distinguished layman, the Earl of Shaftesbury, could be appointed Chancellor without any public dissent. It may almost be said that Lord Nottingham, appointed in 1673, was the first Chancellor who by examining into the grounds on which his predecessors had granted relief outside the law, and by basing his grants of relief on these grounds, turned equity from matter of chance into matter of principle. Henceforth, on points hitherto dealt with in Chancery, precedents decided, and the suitor had from these to evolve a principle which covered his own case, and it was only on points never previously dealt with in Chancery that a new precedent was made and a new principle created. When the Chancellor refused to make new precedents, equity ceased to create new principles; and its rights and remedies outside the law became as fixed as those within the law.

A person seeking relief in a Court of Law was called a *plaintiff* in personal actions and a *demandant* in real actions; and in both cases he *claimed* the benefit to which he was by law entitled. All that the court had power to do was to decide if his claim was good by law. Once it decided that his claim was good at law, it was compelled to grant him relief according to law.

A person, on the other hand, seeking relief in a Court

of Equity, was called a *suitor* or *petitioner*, and he *humbly prayed* the benefit of the court's grace. He was asking for something which the law did not allow him, and which the King alone could give him by the voluntary exercise of his prerogative entitling him when he thought proper to interfere and grant relief outside the law. This is shortly summed up in the maxim that "equitable relief always was within the discretion of the court," while legal relief was *ex debito justitiæ*.

Paragraphs (1) and (2).

These are the points which caused the chief differences in the development of English and Roman equity. Just as the authority on which English equity was based was the royal prerogative, so the authority on which Roman equity was based was the *imperium*—a survival of the royal power to see justice done to the people—which vested in the prætor during his year of office. But from the first the *imperium* entitled the prætor to set out on assuming office a list of the rights and remedies which he would recognise during his reign. This was engraved on a plate of brass and affixed to the wall of his court, so as to enable intending suitors to know what relief they could or could not get. So from the first Roman equity was a matter of principle and a matter of right. English equity was neither matter of principle nor matter of right for many a day.

ARTICLE 3.

Limits of that Authority.

This prerogative to grant relief outside the law, being applicable only where justice so required, could only be exercised in matters of three kinds, namely :—

- (i) matters in which the law gave no rights but conscience required that certain rights should be given, which matters

- are said to be within the *exclusive* jurisdiction of equity ; or
- (ii) matters in which the law gave the rights required by conscience but the remedies which it gave to enforce the rights were insufficient to satisfy justice, which matters are said to be within the *concurrent* jurisdiction of equity ;
 - (iii) matters in which the law gave the rights required by conscience and remedies sufficient to satisfy justice but as to which its process was too defective to secure the remedies without the assistance of equity, which matters were said to be within the *auxiliary* jurisdiction of equity.

Though, as has been stated, it was not until comparatively recently that the principles on which equity would grant relief outside the law were formulated, still from very early times one fact was recognised—that the customs of the realm and the statutes of Parliament constituted the law, and equity could only interfere with that law where it was so defective as to deny, or give inadequate, justice to the subject. As the principles upon which equitable relief would be given were gradually settled, so the ways in which the law might be defective were gradually classified as set out in the above article.

For the purpose of protecting the rights and remedies given by the Court of Chancery but not recognised by Courts of Law, it was sometimes necessary to prevent a person enforcing his legal rights. This was done by the issue of an *injunction* forbidding him, on pain of imprisonment for contempt of court, from proceeding with an action in a Court of Law or executing the judgment procured in such an action. The Courts of Law highly resented this interference with their proceedings, and at last that resentment came to a head in the reign of James I.

In that reign a plaintiff in a common law action obtained judgment against the defendant. Later it was proved before the Chancellor that the judgment had been obtained by the fraud of the plaintiff, who had by stratagem involved the defendant's chief witness in a drinking bout which prevented him giving evidence. Thereupon the Chancellor (Lord Ellesmere) issued an injunction forbidding the plaintiff to sue out execution on his judgment. The Lord Chief Justice (Sir Edward Coke) furiously protested, and threatened the pains of premunire against anyone who interfered with the plaintiff or the execution. Ultimately the dispute went to the decision of the King, who in accordance with the views of his law officers decided that the issue of the injunction was within the powers of the Court of Chancery. Since this decision the right to issue injunctions of this kind has not been disputed, though, as we shall see, since the Judicature Acts their issue is seldom needed.

The jurisdiction to issue these injunctions is usually ranked as auxiliary; but it is auxiliary rather to the grant of equitable than legal remedies.¹

ARTICLE 4.

The Exclusive Jurisdiction of Equity.

In matters within the exclusive jurisdiction of equity the nature and extent of the rights given depended exclusively on equitable principles; and, these rights being recognised only in the Court of Chancery, could be enforced only by equitable remedies.

The importance of the distinction between the exclusive and the other jurisdictions of equity is well shown in the decision of the House of Lords in *Nocton v. Lord Ashburton*.²

¹ See Art. 6.

² [1914] A. C. 932; 35 Digest 55, 493.

Nocton, the defendant in that case, was retained by the plaintiff, Lord Ashburton, as his solicitor to advise him as to a proper investment for certain funds on mortgage of real estate. The defendant advised so negligently that when the plaintiff subsequently realised his security he found it was not nearly sufficient in value to produce on sale anything like the loan advanced upon it. The defendant was at common law guilty of negligence, and so would have been liable in damages but that more than six years had elapsed since the advice was given; and so the action was barred. The plaintiff therefore sued the defendant for fraud. Now to constitute fraud at common law it is necessary to prove that the person charged was not merely guilty of negligent misrepresentation, but also that he made a false representation which (1) was known by him to be false, or (2) was made by him without belief in its truth, or (3) was made by him recklessly or without care whether it was true or false.¹ In other words, to maintain an action at common law it is necessary to prove that the person who made the misrepresentation did so with what has been called a wicked mind. When the case was heard before the judge of first instance, he held that he was bound by these rules of common law; and as there was no sufficient proof that the defendant made the misrepresentation with a wicked mind, he must dismiss the action. On appeal the House of Lords held that this decision would have been right had this been an action for fraud at common law and so within the concurrent jurisdiction; but in fact it was an action for fraud in equity and so within the exclusive jurisdiction and therefore subject to equitable principles; and in equity where one person who is under a fiduciary duty to take care makes a misrepresentation to the person to whom he owes that duty, with the intention that that person shall act on it, then whether he does so because he has a wicked mind or because of mere negligence he is guilty of fraud. Accordingly the decision of the judge of first instance was reversed by the House and the defendant held liable.

¹ *Derry v. Peek* (1889), 14 A. C. 337, at p. 350; 35 Digest 27, 185.

In the same way rights coming within the exclusive jurisdiction not being recognised in courts of law cannot, independent of statute, be enforced otherwise than by remedies outside the law, that is by the remedies provided by the former Court of Chancery for the enforcement of rights recognised by it alone.

Thus, in *Lavery v. Pursell*¹ the plaintiff had entered into a contract for the purchase of an interest in land. Such a contract should be evidenced by a note or memorandum in writing in order to be enforceable at law.² Where, however, it is not in writing it becomes enforceable in equity if it is part performed. Here the contract was not in writing but was part performed by the plaintiff. The defendant repudiated the contract. Now the remedy at law for a breach of contract is damages ; while the remedy in equity is specific performance. The plaintiff brought an action claiming specific performance or, in the alternative, damages. The court held that he would have been entitled to specific performance but that that had become impossible by the lapse of time. The court, however, could not award him damages as a court of law, since by law the agreement was incapable of legal enforcement owing to its not being evidenced in writing.

ARTICLE 5.

The Concurrent Jurisdiction of Equity.

In matters within the concurrent jurisdiction of equity the nature and extent of the rights depended exclusively on legal principles ; and being recognised both in Courts of Law and in the Court of Chancery, they could be enforced either by legal or by equitable remedies ; but

¹ (1889), 39 Ch. D. 508 ; 12 Digest 170, 1249.

² Statute of Frauds, 1677, sect. 4 ; now re-enacted by Law of Property Act, 1925, sect. 40 ; 15 Halsbury's Statutes 216.

before an equitable remedy could be given it had to be shown that the right had been or was about to be violated in such a way as would compel a Court of Law to grant the legal remedy, if the complainant had applied for it.

In matters coming within the concurrent jurisdiction equity only intervenes in aid of the law by granting a remedy for a breach of the law superior to any the law itself could grant. The equitable remedy is therefore merely in substitution for the legal remedy, and accordingly where there is no breach of law for which a court of law would give a legal remedy, equity is unable to give an equitable remedy.¹

This is sometimes forgotten. Thus, in *Colls v. Home and Colonial Stores, Limited*,² the act of which the plaintiff complained was an interference with the ancient lights of his house. The right to light is a legal right, but it is usually enforced by an equitable remedy—that is, by an injunction to restrain the defendant from interfering with the light. Now, at common law to constitute an actionable interference with the right, it must be shown that not merely has the defendant obstructed the light, but that he has obstructed it so gravely as to make the obstruction something in the nature of a nuisance. The Court of Appeal, forgetting that it was merely enforcing a legal right, held in this case that in equity any interference whatever with the right to light could be restrained, and granted the plaintiff an injunction, though the obstruction of his light was not such as would amount to an actionable wrong at common law. On appeal, it was held by the House of Lords, that where a matter was within the concurrent jurisdiction an equitable remedy could be granted only where a legal remedy would lie if the plaintiff had sought a legal remedy; and as in this case the plaintiff could not have recovered damages, he could not obtain an injunction.

¹ As to contemplated breaches of law, see Art. 180, *post*.

² [1904] A. C. 179; 19 Digest 123, 830.

ARTICLE 6.

The Auxiliary Jurisdiction of Equity.

In matters within the auxiliary jurisdiction of equity the nature and extent of both the rights and the remedies depended exclusively on legal principles, and with regard to them equity intervened merely to supply the defects of legal process so as to enable the Courts of Law to give effectively the legal remedies.

In matters coming within the auxiliary jurisdiction equity interfered merely to assist the law to give a legal remedy for a legal wrong. Thus in law an executor who wasted his testator's estate was liable to an action for *devastavit*, but before the law could give damages against him it was necessary to find out what assets the executor had received and what he had done with them. The law had no effective machinery for this purpose; and so it was necessary to have recourse to equity which had, and equity would order the executor to render an account in aid of the action for *devastavit*. Again, in law a person who broke a legal contract was liable to an action for damages for the breach. But where to prove the contract it was necessary to produce documents in the hands of the person guilty of the breach the law could not secure this. Equity could, and so in such cases it ordered discovery of documents, and when these were produced the action for damages could proceed. In the same way equity granted bills for the perpetuation of testimony; bills to take evidence *de bene esse*, in the case of witnesses unable to appear in court through age, ill-health or absence from England, and interpleader where a person was sued as to matters in which he had no personal interest.

There was a marked inclination for matters coming originally within the auxiliary jurisdiction to come within the concurrent. This was due to the fact that the decision

of a matter, if disposed of within the auxiliary jurisdiction, necessitated two proceedings, one in the law courts and another in the Court of Chancery ; while, if disposed of within the concurrent jurisdiction, it necessitated only one. Accordingly, where it was possible, litigants commenced their proceedings in Chancery when it could supply them with a sufficient remedy ; while Chancery endeavoured to supply them with a remedy as effective as the legal one.

ARTICLE 7.

Fusion of the Administration of Equity and Law.

The Court of Chancery and the Courts of Law have now been abolished by Act of Parliament and a High Court of Justice established with jurisdiction to recognise all the rights and to provide all the remedies formerly given either by the Court of Chancery or the Courts of Law. This fusion, however, of the administration of equity and law has in no way altered the nature or extent of equitable rights and remedies. In matters coming within the old exclusive jurisdiction of equity, so far as equity is concerned, the High Court decides the nature and extent of the rights solely by equitable principles and enforces them solely by equitable remedies ; and in matters coming within the old concurrent jurisdiction of equity, it decides the nature and extent of rights solely by legal principles and enforces them by equitable remedies only where the old Courts of Law would have granted legal remedies. So far as equity is concerned, the whole effect of the establishment of the High Court has been to render practically obsolete its auxiliary

jurisdiction by making recourse to it no longer necessary.

It is sometimes said that the Judicature Act, 1873,¹ fused law and equity. This is altogether inaccurate. The object of that Act was neither to fuse nor to confuse the principles which govern equitable rights and remedies with those which govern legal rights and remedies, though it may have had in some instances the latter effect. "The main object of the Judicature Act was to enable the parties to a suit to obtain in that suit, and without the necessity of resorting to another court, all remedies to which they are entitled, properly advanced by them so as to avoid a multiplicity of actions."²

As has been stated, before the Act in matters coming within the auxiliary jurisdiction it was necessary to bring proceedings both in a common law court and in Chancery in order to have one matter disposed of. This is no longer the case, since any court before which a cause is brought has now power to grant all necessary relief whether legal or equitable or both. So that jurisdiction has been rendered almost obsolete. At the same time it has not been abolished.³ For example, although the Act of 1873³ provided that no proceeding pending in any division of the High Court can be restrained by injunction, it has been held that this provision applies only to *pending* proceedings and, in a proper case, an injunction may still be granted to restrain the *institution* of proceedings.⁴ Moreover, the section applies only to proceedings in the High Court, and even pending proceedings in other courts may be restrained.⁵

¹ Repealed and re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925; 4 Halsbury's Statutes 146.

² *Per* Lord WATSON in *Ind, Coope & Co. v. Emmerson* (1887), 12 A. C. 300, at p. 308; 20 Digest 290, 479. See also *Walsh v. Lonsdale* (1882), 21 Ch. D. 9; 18 Digest 267, 63.

³ Sect. 24 (5); now replaced and re-enacted by sect. 41 of the Supreme Court of Judicature (Consolidation) Act, 1925; 13 Halsbury's Statutes 211.

⁴ See *Cercle Restaurant Castiglione Co. v. Lavery* (1881), 18 Ch. D. 555; 10 Digest 834, 5451; *Re Maidstone Palace of Varieties Ltd.*, [1909] 2 Ch. 283; 10 Digest 796, 5028.

⁵ *Wood v. Connolly Bros. Ltd.*, [1911] 1 Ch. 731; 16 Digest 196, 1014; *Ellerman Lines v. Reade*, [1928] 2 K. B. 144; Digest Supp.

As regards matters coming within the exclusive or the concurrent jurisdiction, the principles controlling the rights and the remedies of the parties are precisely what they were before the Act.

ARTICLE 8.

The Chancery Division of the High Court.

Even the fusion of the administration of equity and law effected by the establishment of the High Court is not complete, since that court is composed for our purposes of two parts, called the Chancery and the King's Bench Divisions; and to the former is relegated the hearing of practically all the matters which formerly came within the exclusive or concurrent jurisdiction of equity. If any of these matters are brought before the King's Bench Division, as they may be, the judge has power to remit them for hearing to the Chancery Division.

By section 56 of the Supreme Court of Judicature (Consolidation) Act, 1925,¹ the following are assigned primarily to the Chancery Division: All causes and matters for any of the following purposes—

- The administration of the estates of deceased persons;
- The dissolution of partnerships, or the taking of partnership or other accounts;
- The redemption or foreclosure of mortgages;
- The raising of portions, or of other charges on land;
- The sale, and distribution of the proceeds, of property subject to any lien or charge;
- The execution of trusts, charitable or private;

¹ 13 Halsbury's Statutes 219. Re-enacting sect. 34 of the Judicature Act, 1873.

The rectification or setting aside or cancellation of deeds, or other written instruments ;

The specific performance of contracts between vendors and purchasers of real estate, including contracts for leases ;

The partition or sale of real estate ; and

The wardship of infants and the care of infants' estates.

Besides the matters here assigned to the Chancery Division many others have been allotted to it by special Acts.

ARTICLE 9.

/ Arrangement of the Work.

The distinction between the exclusive and the concurrent jurisdictions of equity has not been strictly observed either by the Legislature or by the court itself, equitable rights being modified and sometimes legally enforced by virtue of Acts of Parliament, and equitable remedies, in being applied for the enforcement of legal rights, being often used by the court to create new equitable rights. It is proposed then, in this work, not to follow that distinction in the arrangement of its contents, but to deal firstly with the chief equitable rights and incidentally with the legal rights and remedies affecting them, and secondly with the chief equitable remedies and incidentally with the equitable rights which have arisen out of the use of them for the purpose of enforcing legal rights.

Just as matters originally coming within the auxiliary jurisdiction tended to come within the concurrent, so matters coming originally within the concurrent jurisdiction tended to come within the exclusive as time went on.

Thus contracts for the sale of land were brought within the concurrent jurisdiction in order to get advantage of the equitable remedy of specific performance, and equity later introduced the equitable doctrine of part performance, which gave the plaintiff rights not recognised by law. Again, covenants relating to the land were brought within it for the benefit of the equitable remedy of injunction, and later equity began to enforce covenants which at law were void as against purchasers of the land. Again, the administration of the assets of deceased persons was brought within it so as to obtain the advantage of the equitable remedy of account, and later equity attached to the office of executor most of the equitable liabilities of trustees.

In the same way Parliament has by many statutes defined and altered purely equitable rights. It has also enforced many purely equitable rights by means of legal remedies, as by enabling the court to transfer the legal estate to the equitable owner and by giving it a discretion to grant damages in lieu of injunctions or specific performance.

This will show that while the old distinction between the exclusive and concurrent jurisdictions remains and should never be forgotten, still it has been so interfered with that it now scarcely forms a good plan for arranging the subject-matter. It is therefore proposed to consider that matter after the manner stated in this Article.

BOOK I.
EQUITABLE RIGHTS.

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INTRODUCTION TO BOOK I.

NATURE OF EQUITABLE
INTERESTS.

ARTICLE 10.

How Equitable Rights arise.

(1) An equitable right arises when a right vested in one person by the law should, in the view of equity, be, as a matter of conscience, vested in another.

(2) Where this state of affairs existed equity did not attempt to transfer the legal right to the person in conscience entitled to it, but directed the person entitled to the legal right to use it for the benefit of the person entitled in conscience to it.

(3) Now by statute equity can transfer legal rights to the person equitably entitled.

Paragraph (1).

It should always be remembered that the Court of Chancery was a Court of Conscience—that is, a court whose object was not so much to protect a person from damage arising from another's wrongdoing, as to prevent the other from soiling his conscience by doing wrong.¹

¹ See *infra*, p. 431, *et seq.*

Most of the rights and remedies given by equity are based on this principle ; and it is carried so far that where an act is contrary to conscience in the view of equity then equity will grant a remedy even though the person complaining of the act suffered thereby no damage whatever. Thus it is in the view of equity contrary to conscience for a trustee to make profit out of dealings with the trust property. In *Parker v. McKenna*,¹ a director of a company (who was as such a trustee of the company's property for the shareholders) bought from the company some unissued shares (that is, property of the company) at a certain price. He did so for the benefit of the company. Later the shares rose greatly in value over the price which he had paid to the company for them. It was held that he must hand over this profit for the benefit of the shareholders.

Paragraph (2).

This is sometimes summed up by saying, conveniently but not very accurately, that equity operated by means of trusts. Equity had no power of its own to transfer the legal rights of one person to another who had morally a better claim to them. All it could do was to direct the person having the legal rights to use them for the other's benefit. Thus if A. by fraud induced X. to convey Blackacre to A., A. became legal owner ; but on X.'s application equity would declare A. a trustee of Blackacre for the benefit of X.

In *Hardoon v. Belilios*² Lord LINDLEY said : " All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in the plaintiff and the equitable title in the defendant." As a definition of a trust, in the strict sense of that term, this dictum is too wide,³ and in subsequent pages we shall use the term "trust" in a narrower sense. In the sense in which Lord LINDLEY used the word, trusts would include the

¹ (1874), L. R. 10 Ch. 96 ; 20 Digest 237, 44.

² [1901] A. C. 118, at p. 123 ; 43 Digest 761, 2045.

³ It is quoted, however, with apparent approval by Ashburner, *Equity*, 2nd edn., p. 84.

whole or almost the whole subject-matter of equity ; but for that very reason the dictum, although imperfect as a definition of a trust, is useful in that it calls attention to the fact that a person has an equitable right in every case in which another, to whom the legal right belongs, is regarded as bound by conscience to use it for his benefit.

Paragraph (3).

Large powers are now given by statute to enable the court to transfer by vesting order the legal ownership to the person equitably entitled without the concurrence or consent of the legal owner.¹

ARTICLE 11.

Equitable Interests in Property.

(1) When the subject-matter of an equitable right is definite property, the person entitled to the right is said to have an equitable interest in the property.

(2) An equitable interest in property may be defined as a right in the nature of a personal servitude issuing out of and annexed to the legal owner's interest in the property.

(3) This right may be such as to impose on the legal owner any obligation ranging from one to let the person entitled to it enjoy the whole benefits of the property to one binding the legal owner merely not to use the property in a particular way.

Paragraph (1).

Practically equitable rights as opposed to equitable remedies are merely extensions and modifications of legal

¹ See *infra*, pp. 112-114.

rights over property. Some of them, however, give neither a right to an interest in definite property nor a right of action. Such, for instance, was a wife's equity to a settlement which consisted in the power of the Court of Chancery to refuse its help to a husband to recover through it property coming by common law to him in right of his wife until he had made a reasonable settlement on her.¹ Such an equity is a right of the court rather than of the person to be benefited by it.

Paragraph (2).

This is intended not as a definition of a trust but merely of an equitable interest in property however that interest may arise.²

The ancient use out of which arose all kinds of equitable interests was no doubt suggested by the personal servitude of Roman Law. But there was this difference between them. A *usus* or *ususfructus*³ was a share in the legal ownership of the property, a deduction from the rights of the legal owner, just as in English Law is a profit *à prendre* or an easement. The English use, on the other hand, was no share of the legal ownership and in no way deducted from the rights of the legal owner: it merely imposed on the legal owner an obligation so long as he remained legal owner to use his rights or some of them for the benefit of the person having the use. The legal estate was, to adopt Lord Coke's phraseology, an interest "issuing out of" the thing owned itself; the equitable interest, an interest not issuing out of the thing

¹ See *post*, p. 413.

² That an equitable interest is a right in the nature of a personal servitude was the view of the late author. Students of jurisprudence should note, however, that there are two schools of thought, one holding that equitable rights and interests are *iura in personam* and the other that they are *iura in rem*. The two views are compared in Winfield, *Law of Tort*, pp. 109 *et seq.*

³ Professor Maitland says that the term "use" was derived, not from the Roman *usus*, but from *ad opus*, in Norman French *al ues*. However this may be, the notion of uses seems to have come straight from the Roman personal servitudes. See on this question Holdsworth, Vol. IV, pp. 407 *et seq.*

owned itself but "a thing collateral, annexed in privity to the estate" of the legal owner of the thing.

An example will make this difference clearer. When a person contracts to purchase land and pays the purchase money before a conveyance is executed, in equity the vendor becomes a trustee of the land for the purchaser until conveyance. In *Graham v. McIlwaine*¹ the plaintiff purchased land which was in the occupation of a tenant; and as the purchaser wished to occupy the land himself, he, after the purchase money had been paid but before conveyance, gave the tenant notice to quit. When the notice expired the tenant refused to give up possession and the purchaser brought an action of ejectment. It was held that though in equity the purchaser was owner in fee simple of the land, yet as he had no interest in law he was not entitled to possession, and therefore the notice to quit was void and the action must fail.

From the fact that all equitable interests issue from the legal estate two consequences follow. In the first place the equitable interest cannot be of greater extent than the legal estate out of which it issues. Thus, if freehold land was vested in X. and Y. for their joint lives in trust for A. in fee simple, all that A. could take was an equitable base fee which would determine on the death of the survivor of X. and Y. An equitable interest cannot survive the legal estate out of which it issues.²

The second consequence following from the fact that an equitable interest issues out of the legal estate and not out of the thing owned itself, is that it must partake of all the infirmities of the legal estate. Thus let us suppose that, before 1926, when realty descended on intestacy to the heir, X. was the owner in fee simple of Blackacre, and that A. was his eldest son and B. his second son. Suppose further that on the death of X. intestate A. was missing and B. took possession of Blackacre as heir. If B. conveyed Blackacre to trustees on trust for B.'s wife the trustees would take the same legal title as B. had; namely, only a possessory title if A. was still living. Consequently, if

¹ [1918] 2 T. R. 35; 31 Digest 450, m.

² See *In re Woking Urban District Council (Basingstoke Canal) Act, 1911*, [1914] 1 Ch. 300; 40 Digest 305, 2620.

A. returned and claimed Blackacre the legal possessory title would come to an end, and so also would the wife's equitable interest issuing out of it.¹

It may be alleged that equitable interests not infrequently issue primarily out of other equitable interests. This is no doubt so. Property is held in trust for X. for life and then for X.'s daughter Y. During X.'s life Y. marries and assigns her interest under her mother's settlement to trustees on trust for sale and to hold on the trusts of her marriage settlement. Those trustees take merely an equitable interest in the property contained in the first settlement. But Y.'s is a sort of sub-settlement, and in the end her interest under it issues as much out of the legal estate held by the trustees of the mother's settlement as does the mother's equitable life estate.

Paragraph (3).

An equitable interest may and often does amount to the whole beneficial ownership of the legal estate out of which it issues. On the other hand, it may amount to the merest equitable easement arising under a negative covenant. Equitable easements are infinitely varied in character, since they may be defined by agreement, while legal easements, though not absolutely fixed, cannot be so defined.²

ARTICLE 12.

Who are bound by Equitable Interests.

(1) Not merely the legal owner against whom the equitable right first arose is bound by this equitable interest, but so *primâ facie* is everyone who takes the legal estate out of which it issues and to which it is annexed.

(2) This rule is modified by the doctrine of the immunity from equities of a *bona fide* pur-

¹ See also *Baker v. Archer-Shee*, [1927] A. C. 844; Digest Supp.; *Re Wells*, [1933] Ch. 29; Digest Supp.

² *Att.-Gen. of Southern Nigeria v. John Holt*, [1915] A. C. 599; 19 Digest 19, 56. See further the note to Art. 175.

chaser for value. According to this doctrine (which in modern times is subject to important exceptions which are indicated below in paragraph (7)) any person who purchased the legal estate or any legal interest in that estate for valuable consideration, provided that at the time when he gave the consideration he was without notice of the existence of the equitable interest, will take the legal estate or interest free from the equitable interest.

(3) This doctrine applies only where the persons entitled to the legal and equitable interests have equal rights in equity to them. They will not have equal rights in equity if the purchaser of the legal interest knew at the time he obtained the legal interest that it was subject to a trust for the person having the equitable interest, nor if it was through his fraud or negligence that such person was induced to give value for the equitable interest.

(4) Notice is either actual or constructive. By actual notice is meant knowledge of the existence of the equitable interests. By constructive notice is meant (a) knowledge of a fact which suggests the existence of the equitable interests, or (b) the failure to take advantage of the possibility of obtaining, by the usual investigation of title which precedes purchase, knowledge of the existence, or knowledge of a fact which would suggest to a reasonable man the existence, of the equitable interests.

(5) Notice to the purchaser's agent is notice to the purchaser only when the agent receives the notice while carrying through his principal's purchase.

(6) Where the same person is a trustee of

different trusts notice which he received while dealing with property subject to one trust as to property subject to another trust is not, in the absence of fraud, constructive notice when he is dealing with the property subject to the second trust.

(7) Certain modern statutes, passed with the object of facilitating dealings with land, have curtailed the operation of the equitable doctrine of notice in two directions: namely, (a) they have provided that certain assurances of and charges on land may be registered and that a purchaser shall not be prejudicially affected by notice of any instrument or matter so capable of registration which is void or not enforceable against him under their provisions by reason of its non-registration, and (b) it has been provided that a conveyance to a purchaser of a legal estate for money or money's worth shall overreach equitable interests affecting that estate, provided that such conveyance is made in one of certain specified ways.

Paragraph (1).

When uses of property first arose it was doubted whether they could be enforced against anyone except the legal owner who undertook to hold the property on use.¹ However, that doubt has long ago disappeared, and now *primâ facie* anyone who takes the legal estate out of which it issues is as much bound by the equitable interest as the original legal owner.

Paragraph (2).

The rule stated in paragraph 1 is modified by the doctrine that (subject to the exceptions indicated in

¹ Holdsworth, Vol. IV, pp. 407 *et seq.*

paragraph 7) a *bona fide* purchaser of property may take free from equitable interests affecting it, provided that (1) he obtains the legal estate in the property or the legal estate is vested in some person on his behalf, (2) he gives valuable consideration for it, and (3) when he gave that consideration he had no notice of the equitable interests.

The principle upon which equity proceeds is that an equitable interest is merely an interest affecting the conscience of the legal owner. If the legal owner obtains his title in such a way that his conscience is not affected by the equitable interest, he is in no way bound by it. This can only occur when the three above conditions are fulfilled. Then the legal owner and the owner of the equitable interests are said to have equal equities—that is, equal rights to the property in a Court of Conscience, while the legal owner has also the legal title, and “where equities are equal” the maxim is that “the law shall prevail.”¹

Four points should be remembered in this connection :

The first is that the legal title obtained by the purchaser for value need not be an absolute legal title : it is only necessary it should be a good one as against the equitable owner. Thus, suppose that A. is trustee of Blackacre for B., and the legal title of A. is a defective one and bad against C. A. sells Blackacre and conveys the legal estate to D. without disclosing the trust. D.’s title as regards C. is no better than was A.’s, but it is good in equity against B., since whatever legal interest in Blackacre A. held in trust for B. is now vested in D.²

The second point is that the legal estate need not be vested in the purchaser before he has notice of the equitable interests. It is only necessary that the value should be actually given before notice ; then if the legal estate is got in by the purchaser

¹ See *Pilcher v. Rawlins* (1872), L. R. 7 Ch. 259 ; 20 Digest 296, 572.

² *Jones v. Powles* (1834), 3 My. & K. 581 ; 20 Digest 298, 526.

afterwards he can rely upon it.¹ This rule applies in all cases save where the conveyance of the legal estate would, to the knowledge of the purchaser, amount to a breach of trust on the part of the legal owner.²

The third is that once a person has notice that an equitable interest has subsisted in property he is affected by it if he purchases the property, even though the vendor induced him by fraud to believe, and reasonably believe, that the equitable interest had determined. Thus, A. in carrying through the purchase of Blackacre from B. discovered that it once had been subject to an equitable charge in favour of C. B. declared that the charge had been discharged, and showed A. what purported to be a discharge from C. On this A. purchased Blackacre. As a fact the discharge was a forgery. A. was bound by the equitable charge.³

The fourth is that notice of the equitable interest affects a legal owner only when the legal owner from whom he takes was bound by the equitable interest. Thus, if A., trustee of Blackacre for B., sells it in breach of trust to C., to whom it is conveyed without notice of the trust, C. is not bound by the trust for B.⁴ If then C. subsequently sells to D., who has notice of the trust, D. takes C.'s good title, and is bound no more than C. was by the trust for B. If instead of selling to D., C. had resold to A., the result would have been different, because equity would not permit A. to take advantage of his own wrong by pleading that

¹ *Brace v. Duchess of Marlborough* (1878), 2 P. Wms. 491; 20 Digest 299, 534. The student should notice that this decision, whilst still valuable as an illustration of the doctrine now under discussion, is not applicable, since 1925, to the tacking of mortgages; see L.P.A., 1925, sect. 94, *post*, p. 393.

² *Shropshire Union Railways Co. v. The Queen* (1875), 7 H. L. 406; 10 Digest 1129, 7956; *Taylor v. Russell*, [1892] A. C. 244, 259; 20 Digest 303, 568; *Taylor v. London & County Banking Co.*, [1901] 2 Ch. 231; 20 Digest 306, 595.

³ *Jared v. Clements*, [1903] 1 Ch. 428; 40 Digest 169, 1384; *Stra. L. C.*, p. 41.

⁴ *Pulcher v. Rawlins* (1872), L. R. 7 Ch. 259; 20 Digest 296, 512; and see *Wilkes v. Spooner*, [1911] 2 K. B. 473; 40 Digest 157, 1231.

he had sold to C. without disclosing the trust affecting Blackacre.¹

Paragraph (3).

This is usually summed up in the maxim that "it is only when the equities are equal that the law shall prevail."

In order that a purchaser for value without notice may obtain the protection of the legal estate it is not absolutely necessary that the legal estate should be conveyed to him: it is sufficient if, as among persons having equitable interests, he has the best right to call for it. Thus, if the legal owner (not being merely a trustee for another) declares himself trustee of it for the benefit of the purchaser, that will give the purchaser priority over other persons having equitable interests.² But the legal estate will not protect a purchaser for value against equitable interests subsisting at the time, or even those created afterwards, if he has by his conduct enabled the legal owner to commit a fraud on the other person equitably entitled. Thus, where a legal mortgagee returns the title-deeds to the mortgagor, and the latter deposits them with a banker, who knows nothing of the legal mortgage, to secure an overdraft, the legal mortgagee may be postponed to the banker, who has only an equitable title.³ In other words, the legal title is a protection only where the equities are equal, and where they are not equal he who has the best equity will be preferred.⁴ But mere innocent negligence on the part of a subsequent legal mortgagee will not make the equities unequal.⁵

¹ *In re Stapleford Colliery Co., Barrow's Case* (1880), 14 Ch. D. 432, 445; 20 Digest 262, 246; *Gordon v. Holland* (1913), 82 L. J. P. C. 81; 20 Digest 263, 249.

² *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556; 20 Digest 302, 565.

³ *Briggs v. Jones* (1870), L. R. 10 Eq. 92; 35 Digest 482, 2146.

⁴ *Oliver v. Hinton*, [1899] 2 Ch. 264; 20 Digest 322, 676; *Walker v. Lanom*, [1907] 2 Ch. 114; 20 Digest 309, 613.

⁵ *Hudson v. Viney*, [1921] 1 Ch. 98; 20 Digest 322, 677.

Paragraph (4).

By section 199 of the Law of Property Act, 1925,¹ it is provided that a purchaser shall not be prejudicially affected by notice of any instrument or matter or any fact or thing unless—

“(a) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or,

“(b) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.”

The above is the statutory definition of notice.

An instructive case on constructive notice is *Hunt v. Luck*.² There A., the owner of certain property, had let the same to certain tenants who paid their rents to W., a rent agent. W. transmitted the rents to G., who again forwarded them to A.; but in fact A. had conveyed the property to G., though this was not known until after A.'s death. Meanwhile G. mortgaged the property to H. The paper title to the property being complete, H. had merely made some inquiries as to its value, and his agent in so doing became aware that the tenants paid their rent to W. After the death of A. his real representative applied to the court to have the conveyance to G. set aside. H. objected on the ground that he was a purchaser for value from G. without notice: It was held that as against H., the conveyance could not be set aside. “The rule established . . . may be stated thus: (1) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights;

¹ 15 Halsbury's Statutes 378.

² [1902] 1 Ch. 428; 40 Digest 157, 1259.

(2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights." The receipt of rents by a rent agent as in this case is, of course, not inconsistent with the title of the vendor, and, therefore, does not, as the phrase is, "put the purchaser on inquiry."

The inquiries which "ought reasonably to have been made" include inquiries such as prudent purchasers ordinarily make. Until 1926 this rule was carried so far that a purchaser might be affected by constructive notice of what normally could only be discovered by the perusal of documents for which he could not call under even an open contract, that is, a contract not defining the length of title to be shown by the vendor but leaving the vendor under an obligation to produce a title for the statutory period. Thus, it was provided by the Vendor and Purchaser Act, 1874,¹ that under an open contract to grant or assign a term of years the intended grantee or assignee should not have the right to call for the title to the reversion. Nevertheless, in *Patman v. Harland*,² it was held that this provision did not prevent the grantee or assignee from being affected by constructive notice of what he would have discovered if he had investigated the title to the reversion. With regard to contracts made after 1925, however, the obvious hardship of this decision has been removed by the Law of Property Act, 1925. It is still the law that under an open contract to grant or assign a term of years the intended lessee or assignee cannot call for the title to the reversion³; but it is also provided⁴ that an intended lessee or assignee who is thus precluded from calling for the title to the reversion shall not "be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice." In other words, a purchaser need peruse only the statutory title,

¹ Sect. 2; see also Conveyancing Act, 1881, sect. 3 (1).

² (1881), 17 Ch. D. 353.

³ Law of Property Act, 1925, sect. 44 (2), (3), (4); 15 Halsbury's Statutes 221.

⁴ *Ibid.*, sect. 44 (5); 15 Halsbury's Statutes 222.

and if that is free from equitable claims he need not trouble further. But even these provisions do not prevent a purchaser from being bound by a matter of which he has actual notice or which is properly registered.¹

The rule of constructive notice applies, it seems, even where there was, in fact, no sale to the new owner. Thus where a person entered without title upon land and retained possession of it for twelve years without acknowledging the true owner's title, he obtained under the Real Property Limitation Act, 1874,² a good title against the true owner, but he was held to be bound by certain equities of which he would have obtained notice had he had an inspection of the true owner's title-deeds.³

One more example of the application of this doctrine of constructive notice is very important, because of its bearing on equitable mortgages. Such mortgages, as we shall see, are frequently made simply by deposit of the title-deeds of property as security for a loan. It has been held that if the title-deeds are not produced and on inquiry the vendor gives a reasonable excuse for their absence, the absence is not in itself sufficient to give the purchaser notice of the equitable mortgage.⁴ A failure, however, to inquire as to the reason why the title-deeds are missing is sufficient to fix the purchaser with notice of any rights to which the person who has possession of them is in equity entitled over the property sold.⁵

Paragraph (5).

Notice given to the solicitor of a purchaser is notice (sometimes called *imputed notice*) to the purchaser whether the solicitor communicates it to the purchaser or not, unless the notice related to the solicitor's own fraud.⁶

¹ *Post*, p. 35 *et seq.*

² Replaced after June 1940 by the Limitation Act, 1939.

³ *In re Nisbet and Potts' Contract*, [1906] 1 Ch. 386; 40 Digest 76, 590.

⁴ *Espin v. Pemberton* (1859), 3 De G. & Jo. 547; 40 Digest 167, 1368; see also *In re Green*, [1907] 1 I. R. 57.

⁵ *Maxfield v. Burton* (1873), L. R. 17 Eq. 15; 35 Digest 464, 2016.

⁶ *Waldy v. Gray* (1875), L. R. 20 Eq. 238; 35 Digest 472, 2072. For a discussion of the nature of constructive notice see *Kettlewell v. Watson* (1882), 21 Ch. D. 685, at p. 704.

But notice must be received by the solicitor of the purchaser "as such."¹

Paragraph (6).

This is enacted by section 28 of the Trustee Act, 1925, and simply extends the rule applicable to solicitors dealing with different properties to trustees dealing with different trust properties.

Paragraph (7).

The most important statutory provision making notice of a charge depend on whether or not the charge is registered is contained in the Law of Property Act, 1925.² Section 199 of that Act provides that a purchaser³ shall not be prejudicially affected by notice of any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, which is void or not enforceable as against him under that Act or enactment, by reason of the non-registration thereof. Under the Land Charges Act, 1925,⁴ the registrar must keep, in the prescribed manner, five registers, of which the four following are of present importance, namely---

(1) A Register of Pending Actions. In this may be registered any action, information or proceeding pending in court relating to land or any interest in or charge on land, and any bankruptcy petition filed after 1925.⁵ And it is further provided⁶ that a pending action, as thus defined, shall not bind a purchaser who is without *express* notice thereof unless it is for the time being duly registered ;

¹ As to the meaning of this, see *Thorne v. Heard and Marsh*, [1895] A. C. 495, at p. 501 ; 35 Digest 471, 2060.

² 15 Halsbury's Statutes 378.

³ Unless the context otherwise requires "purchaser" means any person (including a mortgagee or lessee) who for valuable consideration takes any interest in land or in a charge on land ; Land Charges Act, 1925, sect. 20 ; 15 Halsbury's Statutes 542. See also Law of Property Act, 1925, sect. 205 (1) (xxi) ; 15 Halsbury's Statutes 388.

⁴ Sect. 1 ; 15 Halsbury's Statutes 524.

⁵ Sect. 2 ; 15 Halsbury's Statutes 525.

⁶ Sect. 3 ; 15 Halsbury's Statutes 527.

but, as respects a bankruptcy petition, this protection extends only to a purchaser of a legal estate in good faith, for money or money's worth, without notice of an available act of bankruptcy.

(2) A Register of Writs and Orders affecting Land. In this there may be registered :—

- (a) any writ or order affecting land made or issued by any court for the purpose of enforcing a judgment, statute or recognizance, whether obtained on behalf of the Crown or otherwise, or for the purpose of enforcing any inquisition finding a debt due to the Crown, or any obligation or specialty made to the Crown ;
- (b) any order appointing a receiver or sequestrator of land ;
- (c) any receiving order in bankruptcy made after 1925.

With regard to these they are void as against a purchaser unless they are for the time being duly registered, even though the purchaser has express notice of them ; except that, as respects a receiving order in bankruptcy, protection is afforded only to a purchaser of a legal estate in good faith, for money or money's worth, without notice of an available act of bankruptcy.¹

(3) A Register of Deeds of Arrangement affecting Land, and with regard to this it is provided ² that every deed of arrangement, no matter what may be the date at which it was made, shall be void against a purchaser of any land comprised in it or affected by it, unless the deed of arrangement is for the time being duly registered.

(4) A Register of Land Charges. This is by far the most important of the registers. The charges registrable in it are very numerous and are divided into classes ³ as follow :—

Class A.—A rent, or annuity, or principal money payable by instalments or otherwise, being a charge

¹ Sect. 7 ; 15 Halsbury's Statutes 530.

² Sects. 8, 9 ; 15 Halsbury's Statutes 530.

³ Sect. 10 ; 15 Halsbury's Statutes 531.

(otherwise than by deed) upon land *created pursuant to the application of some person*, under various statutes,¹ the date of the creation of the charge being in this case immaterial.

Class B.—A charge on land (not being a local land charge) of any of the kinds described in Class A, *created otherwise than pursuant to the application of any person*,² but if created before 1926 only if acquired under a conveyance made since 1925.

Class C.—A mortgage, charge, or obligation affecting land of any of the following kinds, but (except in the case of a puisne mortgage) if created before 1926 only if acquired under a conveyance made after 1925, namely :—

- (i) a puisne mortgage ; that is, any legal mortgage not being a mortgage protected by a deposit of documents relating to the legal estate affected ; and
- (ii) a limited owner's charge ; that is, any equitable charge acquired by a tenant for life or statutory owner under the provisions of some statute by reason of the discharge by him of liabilities, such as death duties, and to which special priority is given by the statute ; and
- (iii) a general equitable charge ; that is, any other equitable charge, which is *not* secured by a deposit of documents relating to the legal estate affected, and does not arise or affect

¹ These are various charges which, under the provisions of certain statutes, a limited owner is entitled to have created on application in return for money borrowed for and expended on the improvement of land. The statutes in question are indicated in sect. 10 of the Land Charges Act, 1925 ; 15 Halsbury's Statutes 531.

² Charges of this kind are not frequently encountered in ordinary practice. Probably the most common example is in relation to road-making expenses incurred by a local authority under sect. 257 of the Public Health Act, 1875 ; 13 Halsbury's Statutes 733. See *R. v. Land Registry* (1890), 24 Q. B. D. 178 ; 26 Digest 537, 2368.

an interest arising under a trust for sale or a settlement and is not included in any other class of land charge¹; and

- (iv) an estate contract; that is, any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption or any other like right.

Class D.—A charge or obligation affecting land of any of the following kinds, namely :—

- (i) Any charge acquired by the Commissioners of Inland Revenue under any statute passed or to be passed for death duties leviable or payable on any death occurring after 1925; and
- (ii) A restrictive covenant; that is, a covenant or agreement (*not being a covenant or agreement made between a lessor and lessee*) restrictive of the user of land entered into after 1925; and
- (iii) An equitable easement; that is, any easement, right, or privilege over or affecting land, created or arising after 1925 and being merely an equitable interest.

Class E.—An annuity for life created before 1926, otherwise than by will or marriage settlement, and not registered in the register of annuities.²

It should be noticed that of the various kinds of charges indicated above some are legal and some equitable. The position of a purchaser in relation to them, however, does

¹ By the Law of Property (Amendment) Act, 1926, Schedule; 15 Halsbury's Statutes 549, this does not include a charge given by way of indemnity against apportioned rents or against the breach or non-observance of covenants or conditions.

² This register is now closed. Annuities of this kind created *after* 1925 are registrable as general equitable charges in Class C.

not depend upon whether they are legal or equitable but upon whether they are registered. Even then the position is not the same with regard to all classes of charges, and the effect of non-registration of a charge depends upon the class to which the charge belongs.¹ A land charge of Class A, for instance, created after 1888, is void as against a purchaser unless it is registered before the completion of the purchase. The same is generally true of charges falling within Classes B, C, and D, and created or arising after 1925; but as regards charges of Class D, and also estate contracts, a purchaser will not be protected unless he is a purchaser of a *legal* estate for money or money's worth. On the other hand, a charge of Class E which is not duly registered is void against both a creditor and a purchaser of *any* interest. There is also a special provision with regard to charges of Classes B and C created before 1926; at the expiration of one year from the first conveyance made after 1925 a charge of either class will be void against a purchaser unless it is registered before completion of the purchase.

These are by no means the only statutory provisions dealing with the registration of charges. Mortgages and charges created by a company, for instance, must be registered in a public register kept at Somerset House.² Again, special provision is made for the registration of certain charges affecting land in Yorkshire³ or Middlesex.⁴ Local land charges, that is, various charges acquired by local authorities under the provisions of certain statutes, are registrable locally.⁵ And agricultural charges arising

¹ See Land Charges Act, 1925, sects. 13 and 14; 15 Halsbury's Statutes 537, 538.

² Companies Act, 1929, sects. 79-87, 91; 2 Halsbury's Statutes 822-828, 831.

³ See Land Charges Act, 1925, sect. 10 (5) (6); 15 Halsbury's Statutes 536; Law of Property (Amendment) Act, 1926, Sched.; 15 Halsbury's Statutes 549.

⁴ See Land Charges Act, 1925, sect. 18; 15 Halsbury's Statutes 542.

⁵ Land Charges Act, 1925, sect. 15; 15 Halsbury's Statutes 538; Law of Property (Amendment) Act, 1926, Sched.; 15 Halsbury's Statutes 549; *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379; 40 Digest 82, 634.

under the Agricultural Credits Act, 1928,¹ are registrable in accordance with the provisions of that statute.² Moreover, it will be found that whenever a statute makes provision for the registration of charges it provides also for the effect of non-registration.

It is not possible in these pages to analyse all these statutes. Sufficient has been said to show that, so far as concerns most of the charges encountered in normal practice, the first question to be asked is, not whether the purchaser had notice of them, but whether any, and if so what, statutory provision has been made for their registration. The result is that the operation of the equitable doctrine of notice has been curtailed considerably, but that doctrine has not been abrogated entirely. All equitable interests are not *charges*, and there are still some interests with reference to which the doctrine of notice may be important.

But even the owners of equitable interests which are not charges may be affected by recent statutory provisions ; because statute law has provided that, in many cases, a purchaser may take land free from equitable interests affecting it, even though he has notice of them. Provision to this effect is made by section 2 of the Law of Property Act, 1925,³ which enacts that a conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, *whether or not the purchaser has notice thereof*, if the conveyance is made (i) under the Settled Land Act, 1925, or (ii) by trustees for sale, or (iii) by a mortgagee or personal representative in the exercise of his paramount powers, or (iv) under an order of the court. Certain rules must be observed, however, with regard to the payment of the purchase money. If the conveyance is made under the Settled Land Act, 1925, or by trustees for sale, any capital money arising from the transaction must be paid to at least two trustees or a trust corporation. Where the conveyance is made by a mort-

¹ 1 Halsbury's Statutes 170.

² See sect. 9 ; 1 Halsbury's Statutes 176.

³ 15 Halsbury's Statutes 180.

gaggee or personal representative the capital money must be paid to the mortgagee or personal representative, and where the conveyance is made under an order of the court the capital money must be paid into court or otherwise in accordance with the order. It is provided also, in effect, that the only equitable interests or powers which can be overreached are such as are "capable of being overreached" by the particular mode of conveyance employed. Such a provision is not easy for the average student to understand; but it means that, in order to decide which equitable interests or powers are overreached by the conveyance under consideration, it is necessary to consider also the statutory provisions relating to that particular mode of conveyance. Thus it is provided¹ that if the conveyance is made under the Settled Land Act, 1925, it shall pass the land conveyed to the purchaser discharged from the equitable interests of persons entitled under the settlement. Into the details of the many provisions of this kind it is not possible to enter at present. The student who wishes to pursue the matter further should consult the text-books on real property.² What now should be noticed is that modern statutes have modified the equitable doctrine of notice to such an extent that there are cases in which a purchaser can take free even from equitable interests of which he had notice.

That does not mean, however, that the persons entitled to those equitable interests are deprived of all benefits they might have obtained therefrom. On the contrary, if the relevant statutes are consulted it will be found invariably that, while equitable interests may be overreached in the ways indicated, they are not destroyed or extinguished. In fact, they continue to exist, but they become enforceable, not against the land which the purchaser takes, but against the purchase money which he pays for it. The object of the statutory provisions which have been outlined was merely to facilitate transfers of land. The equitable doctrine of notice was, in its

¹ Settled Land Act, 1925, sect. 72; 17 Halsbury's Statutes 904.

² *E.g.* Cheshire, *Modern Real Property*, 4th edn., p. 685 *et seq.*

origin, reasonable enough, because it meant, in effect, nothing more nor less than this : that a purchaser should not be allowed, merely because he obtained the legal estate, to ignore equitable interests of which he knew or ought to have known. But it was felt that in modern times there were cases in which the doctrine produced inconvenience, because equitable interests had become so numerous that a would-be purchaser of a legal estate might have a complicated task in investigating the title thereto and, moreover, to give him an unencumbered legal estate might involve a complicated transaction in which the owners of equitable interests must concur. It was for such reasons that the provisions for overreaching equities were enacted. Their object was simply to free the legal estate, in a proper case, from equitable interests and at the same time to preserve the benefit of those interests to the persons entitled to them by enabling such persons to enforce their claims against the purchase money.

ARTICLE 13.

Equitable Interests in Realty may be Personalty and vice versâ.

Whether legal interests are realty or personalty always depends solely upon the actual nature of the particular legal interest. Whether equitable interests are realty or personalty depends upon the nature of the transaction which brought the particular equitable interest into existence. If in the view of equity by reason of the nature of that transaction they ought to be considered personalty they will be so considered although they subsist in freehold lands, and if they ought to be considered realty they will be so considered although they subsist in chattels.

For present purposes it is sufficient by an illustration or two to explain the difference between the legal and equitable principles above stated.

At law, whether property is realty or personalty depends on the actual nature of the particular interest, and not in any respect on the wishes of its owners. For example, A. is owner of the fee simple of Blackacre. That interest is realty with all the incidents of realty. Suppose A. declares himself trustee of it for B., C., and D. upon trust to sell it at his discretion and divide the proceeds in equal shares among them. B., C., and D. then become the equitable owners of the fee simple of Blackacre. That, however, remains in law still vested in A. and still has all the incidents of realty. If A. died intestate the fee simple would at common law have descended to his heir as realty. But B., C., and D.'s equitable interests are personalty from the moment the trust is declared, and this whether A. in fact sells Blackacre or not. Thus on the death of one of them his interest in Blackacre would have devolved at common law not for the benefit of his heir but for the benefit of his personal representatives.

This is an example of the doctrine of *conversion*, which will be discussed in more detail in later pages.¹

Again, X. is owner of the fee simple of Whiteacre. He mortgages it to Y. to secure a loan. In law the effect of this is that Y. takes the fee simple and on his death intestate it would at common law have descended to his heir. But in equity he will be regarded as having simply a money charge upon Whiteacre, and the right to this in equity is personalty, and so at common law it would have devolved like other personalty for the benefit of his next of kin.

Once equity regards interests subsisting in freehold land as personalty, or interests subsisting in chattels as

¹ *Post*, p. 251 *et seq.*

realty, it attaches the usual legal incidents of personality and realty to them.

ARTICLE 14.

Equitable Interests in Land not the Subject of Tenure.

Legal interests in freehold lands always were, while equitable interests in freehold lands, even when such interests were unconverted, never were, the subject of tenure. Equitable interests were therefore free in general from the incidents of tenure. Thus they have always been capable of being created and assigned without feoffment; and probably fees in equitable realty might have been created and assigned without words of inheritance. Again, a husband's equitable fee tail or fee simple was not on his death liable to dower until the Dower Act, 1833, though a wife's equitable fee tail or fee simple was liable to curtesy. Again, an equitable contingent remainder was never liable to fail by the determination of the preceding interest before it was ready to vest, though it and all other equitable interests in expectancy are subject to the rules against perpetuities. Finally, an equitable fee simple was not, until the Intestates Estates Act, 1884, liable to escheat but sank into the land for the benefit of the owner of the legal interest in the trust property, who was called the *terre-tenant*.¹

¹ Nowadays, land, whether held for a legal or an equitable estate, does not escheat but goes as *bona vacantia* to the Crown, or the Duchy of Lancaster, or the Duke of Cornwall; Administration of Estates Act, 1925, sects. 45, 46; 8 Halsbury's Statutes 345.

It is commonly said that the reason equitable interests were not subject to the incidents arising out of tenure was because the seisin was not in the equitable owner but in the legal owner. This is certainly what justified the Court of Chancery in holding, and enabled it to hold, that such incidents did not affect equitable interests. It justified the court in doing so, since it left the legal owner subject to answer all the burdens imposed by tenure,¹ and so, in theory at least, did not injure the rights of the lord. It enabled it to do so since seisin was the foundation of ownership at common law, and one who had not the seisin was regarded as having no legal interest in the land. Consequently the Common Law Courts refused to recognise equitable owners, and left the Court of Chancery a free hand to settle for itself what were the incidents which would attach to equitable estates.

That the court took advantage of this to declare that many legal incidents affecting legal freeholds did not affect equitable freeholds, however, may be referred to the fact that the court held such incidents undesirable rather than to any merely technical rule. The Article itself shows that the court when it thought proper attached incidents based on tenure to equitable interests. Thus a husband's right of curtesy² and the operation of a fine or recovery in barring estates tail both depended on tenure.³ As we shall see,⁴ many other legal incidents were also attached to them. And some others have been attached by special statutes.

ARTICLE 15.

Equitable Personalty may be held in Successive Interests.

Legal interests in personalty could not be divided up into parts to be enjoyed in succes-

¹ *Copestake v. Hoper*, [1908] 2 Ch. 10.

² *Casborne v. Scarfe* (1737), 1 Atk. 603; 35 Digest 343, 853.

³ *North v. Way* (1681), 1 Vern. 13.

⁴ Art. 17.

sion by different owners. Equitable interests in personalty though unconverted, and equitable interests in realty though converted, could be so divided up. The parts could, however, only be of two kinds, namely, partial interests, such as life interests or interests for years, and absolute interests in remainder following these. In equity as in law heritable estates could not be created in personalty until 1926. But if equitable interests in personalty were converted, then they became realty, and where they were absolute they could be limited out in fees tail and fees simple as freely as if they were legal interests in freeholds.

If at common law the owner of personalty assigned it to A. for life and then to B. absolutely, A. became immediately entitled absolutely to the personalty, and the gift over on A.'s death to B. failed. If, however, the owner had assigned the personalty to X., and directed him to hold it for the benefit of A. for life, and then for B. absolutely, the Court of Chancery would have compelled X. to carry out this trust. A. could have claimed only the income during his life, and on his death B. would have been entitled to require X. to transfer the personalty to him.

While equity thus allowed limited interests to be created in personalty, it did not allow estates such as at law could subsist only in realty to be so created, except in cases of conversion. These estates were heritable estates, namely, fees simple and fees tail. If the owner of personalty transferred it to X. to hold it for the benefit of A. for life, and then for the benefit of B. and his heirs, or of B. and the heirs of his body, on A.'s death B. became entitled absolutely.¹

But as already pointed out, if personalty was converted into equitable realty, or realty into equitable personalty, the ordinary incidents of realty and personalty immedi-

¹ *Elton v. Eason* (1812), 19 Ves. 73; 44 Digest 942, 7989.

ately attached to it.¹ Moreover, since 1925, realty and personalty have been assimilated in several important respects. In particular, a legal estate tail can no longer exist even in realty.² But a corresponding interest, called an entailed interest, can exist in equity, and it can so exist both in realty and in personalty.³ Even now, however, an estate in fee simple cannot exist in personalty either at law or in equity.

ARTICLE 16.

Assignment of Equitable Interests.

(1) Legal interests formerly were in many cases unassignable; equitable interests were always assignable.

(2) Equitable interests were formerly assignable by parol, but since 1677 if they arise under express trusts they are assignable only in writing; subject to this exception, that an equitable entailed interest was formerly barrable only by a fine or recovery, and since 1833 is barrable *inter vivos* only by a deed.

(3) On the assignment of an equitable interest, the assignee takes it subject to prior equitable interests affecting it in the hands of the assignor, whether he gives value for the assignment or not and whether he has notice of the prior equitable interests or not.

(4) This last principle is subject to the qualification that the assignee will not be postponed to prior equitable interests unless the owners of these have given the legal owners of the property notice of them.

¹ See Art. 13.

² Law of Property Act, 1925, sect. 1; 15 Halsbury's Statutes 177.

³ *Ibid.*, sect. 130; 15 Halsbury's Statutes 308.

Paragraph (1).

It seems doubtful whether at one time fees could be transferred at law at all, and until comparatively recent times many contingent interests in realty and most choses in action were unassignable. These now have by various statutes been declared capable of being assured at law. But as a general principle, wherever equity created an equitable interest, it permitted it to be assured. Moreover, equity permitted equitable interests in many unassignable legal interests to be created by declaration of trust. This formerly led to many difficulties as to whether the legal owner intended a gift at law or a declaration of trust in equity—difficulties not yet overcome, since sometimes a gift in law, to be valid, must be made by deed or with some other formality not required for a valid declaration of trust.

Paragraph (2).

Before the Statute of Frauds, 1677, all equitable interests, except an equitable interest in tail, could be transferred *inter vivos* or *mortis causâ* by parol—that is, without a written instrument of any kind. Section 9 of the statute, however, enacted that an assignment by a beneficiary of his interest under a trust must be in writing. This section is now replaced by section 53 of the Law of Property Act, 1925, which provides that “a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing . . . or by will.”

It is to be noticed that this enactment does not refer to the *creation* of equitable interests by declaration of trust; that it does refer to assignment of trusts of all kinds of property and not merely of land; and a will devising or bequeathing an equitable interest must now conform to the requirements of section 9 of the Wills Act, 1837.¹

The courts, in order to preserve the peculiar characteristics of fees tail, held that they could be barred—

¹ See *Stratton's Wills*, pp. 45, 51; 20 Halsbury's Statutes 441.

i.e. turned into fees simple—only by fines or recoveries. These methods properly were adapted to deal with the legal estate, and, obviously, could operate only *inter vivos*. The Fines and Recoveries Act, 1833, substituted a simple deed, and, after that Act, a legal fee tail and an equitable entailed interest could be barred by a simple disentailing deed; but the Act required that the deed should be inrolled, *i.e.* registered. Since 1925, however, a legal fee tail cannot exist and every entailed interest necessarily must be equitable.¹ A disentailing deed is still the appropriate method for barring an equitable entailed interest *inter vivos*, though the Law of Property Act, 1925,² abolishes the necessity for inrolment of disentailing deeds executed after that year. The same Act³ also gave to a tenant in tail a power, which previously he lacked, to bar the entail by will; but it provided that the will must be executed, or confirmed or republished by a codicil executed after 1925, and the devise or bequest by which it is sought to bar the entail must refer either to the entailed property or the instrument under which it was acquired or else to entailed property generally.

Paragraph (3).

As between persons entitled to equitable interests in the same property, the equitable doctrine as to the priority of a purchaser for value without notice has no place. The legal rule *Nemo dat quod non habet* applies to them as it does to persons entitled to legal interests, and accordingly the purchaser for value of an equitable interest takes subject to all other equitable interests preceding in point of time the interests he purchases. This is usually summed up by the maxim: "Who is first in time is stronger in right"—*Qui prior est tempore potior est jure*.

One example of this doctrine is sufficient for purposes of illustration. In *Cave v. Cave*,⁴ A., the trustee for X.

¹ Law of Property Act, 1925, sect. 1; 15 Halsbury's Statutes 177.

² Sect. 133; 15 Halsbury's Statutes 312.

³ Sect. 176; 15 Halsbury's Statutes 358.

⁴ (1880), 15 Ch. D. 639; 42 Digest 395, 4437. See also *Cloutie v. Storey*, [1911] 1 Ch. 18; 37 Digest 384, 3.

of certain funds, invested them in breach of trust in the purchase of Blackacre, the conveyance of which was taken in the name of A.'s brother B. Now Blackacre having been bought with trust funds, the equitable estate in it belonged to X., just as before the purchase X. was entitled to the equitable estate in the trust funds. Afterwards B. borrowed money from C., who had no notice of the trust for X., and as a security gave a legal mortgage of Blackacre—that is, a mortgage which transferred the legal title to Blackacre—to C. Subsequently B. borrowed further money on a second, equitable, mortgage of the trust estate from D. On the question as to the priorities of X., C., and D. arising, it was held that C., as having the legal title to Blackacre, took priority over X. and D., who were only equitably entitled. As between X. and D., X. was entitled to priority as, though D. was purchaser for value of an equitable interest, yet X.'s interest preceded D.'s in point of time, and so the maxim *Qui prior est tempore potior est jure* applied.

It may just be added that the rule applies not merely to prior equitable interests—in the sense of estates—but to what may be called equitable easements. Thus if A. on conveying Blackacre to B. covenants not to build on certain portions of Whiteacre, which he retains, this covenant does not at law run with Whiteacre.¹ It does, however, operate in equity against any purchaser of the legal estate in Whiteacre who takes with notice, and against any purchaser of the equitable estate whether he has notice or not.²

This equitable principle—that an equitable assignee takes subject to all equities—is now extended to debts and other legal choses in action which were before the Judicature Act, 1873, assignable only in equity. Section 136 of the Law of Property Act, 1925,³ makes such legal choses in action assignable at law by writing under the hand of the assignor with written notice to the debtor,

¹ *Spencer's Case* (1584), 5 Coke, 16; 31 Digest 144, 2798.

² *Rogers v. Hosegood*, [1900] 2 Ch. 388, at p. 406; 40 Digest 312, 2664.

³ Re-enacting sect. 25 (6) of the Judicature Act, 1873; 15 Halsbury's Statutes 313.

trustee, or other person liable. But such assignment is made expressly "subject to equities having priority over the right of the assignee."¹

Paragraph (4).

The rule *Qui prior est tempore potior est jure* is subject to a limitation, namely, that if a person who has an equitable interest assigns his interest first to A. and afterwards to B., B. having no notice of the previous assignment to A., then the right to the equitable interest assigned depends not on the priority in point of time of the assignments to A. and B., but upon the priority in point of time of the notice of such assignments which shall be given to the trustees of the legal property.² This is usually called the rule in *Dearle v. Hall*.³ Thus in *Montefiore v. Guedalla*,⁴ A., a Jewess, married in Morocco and on her marriage an instrument called a "ketubah" was executed under which the children of the marriage were entitled to interests in her property. Certain funds belonging to her were paid by her trustees in England into court. A. died intestate, and her husband took out administration of her estate. As her administrator he assigned for value A.'s property in court to B. B. had no notice, and no notice had been given to A.'s trustees, of the "ketubah." B. gave notice of his assignment by obtaining what is called a "stop order"—that is, an order not to pay the money out of court without notice to him. It was held that B. was entitled in consequence of such notice to priority over the children of A.

The rule in *Dearle v. Hall*, *supra*, has always applied in cases where the equitable interest concerned is personalty; that is, cases where a person has an equitable interest which, whether it subsists in legal realty or in legal personalty, can only be claimed in equity in the form of

¹ See *Williams v. Atlantic Assurance Co.*, [1933] 1 K. B. 81; Digest Supp.

² *Re Lake, Ex parte Cavendish*, [1903] 1 K. B. 151; 29 Digest 376, 3015. See also *The Zigurds*, [1933] P. 87.

³ (1823), 3 Russ. 1; 8 Digest 468, 393.

⁴ [1903] 2 Ch. 26; 8 Digest 476, 462.

money or other pure personalty, as for instance an interest in freehold estate which is vested in trustees upon trust to sell and divide the proceeds among the assignor and other persons.¹ And by section 137 of the Law of Property Act, 1925, the application of the rule is extended to dealings,² after 1925, with equitable interests in land, capital money and securities representing capital money. The same section also contains provisions with regard to the notice to be given in connection with dealings with equitable interests in land. If the equitable interest assigned is in settled land, or in capital money or securities representing capital money, the notice must be served on the trustees of the settlement. If the land is settled on trust for sale, the notice must be served on the trustees for sale; and in other cases the notice must be served on the estate owner of the land.³ Provision is also made by the same section for cases where a valid notice cannot be served or cannot be served without unreasonable cost or delay, as, for example, where there are no trustees. In such a case a purchaser may require, at his own cost, that a memorandum of the dealing shall be indorsed on the instrument creating the trust or, if the trust is created by statute or by operation of law, or in any other case in which there is no trust instrument, on the document (for example, letters of administration) under which the equitable interest is acquired or has devolved. Such an indorsement will be as effective, for the purpose of preserving priority, as if notice had been given to trustees.

This last provision with regard to indorsement is applicable whether the property be realty or personalty; and so also is a provision, contained in the same section, with regard to the form which the notice must take. Before 1926, notice might be given by word of mouth; and the sole question was whether the person whose duty

¹ *Lloyds Bank v. Pearson*, [1901] 1 Ch. 865; 8 Digest 435, 122; *Gresham Life Assurance Co. v. Crowther*, [1915] 1 Ch. 214; 8 Digest 471, 423.

² "Dealing" includes a disposition by operation of law. There must, however, be a trust in existence; the section does *not* apply to the creation of an equitable interest.

³ If, however, the money or securities are in court a stop order should be obtained: *Stephens v. Green*, [1895] 2 Ch. 148; 8 Digest 461, 328.

it was to pay the assignor received actual knowledge of the assignment or such information in regard to it as would induce a business man to act upon it.¹ Now, however, it is provided that notice must be in writing.

Apart from the two provisions indicated and dealing with the indorsement of a memorandum and the form of a notice, there are no statutory provisions dealing with notice where the equitable interest assigned is in pure personalty. It has been decided, however, that notice must be given to the debtor, trustee or other person who is under a duty to pay the money to the assignor.²

Notice to the trustee's solicitor is not notice to the trustee unless the trustee has authorised the solicitor to receive notice³; and where one of several trustees is himself the equitable owner who assigns, notice of the assignment must be given to the other trustees.⁴ It would seem that where notice is given by an assignee to one only of several trustees, and after the death of such trustee notice is given by a subsequent assignee to the other trustees, such subsequent assignee is entitled to priority over the earlier assignee.⁵ The notice must be given to the trustee after he becomes trustee, notice given before then being no notice.⁶ Lastly, it should be noticed that difficulties arising from changes of trustees may now be obviated by adopting the procedure provided by section 138 of the Law of Property Act, 1925, which enables a trust corporation to be nominated to receive and keep a register of notices of dealings affecting real or personal property.

¹ *Per* Lord CAIRNS in *Lloyd v. Banks* (1868), L. R. 3 Ch. App. 488, 490; 8 Digest 467, 380. See also *The Zigurds*, [1933] P. 87; Digest Supp.

² *Stephens v. Green*, [1895] 2 Ch. 148; 8 Digest 461, 328.

³ *Saffron Walden Building Society v. Raynor* (1880), 14 Ch. D. 406; 8 Digest 463, 345.

⁴ *Lloyds Bank v. Pearson*, [1901] 1 Ch. 865; 8 Digest 435, 122.

⁵ *Re Phillips' Trusts*, [1903] 1 Ch. 183; 8 Digest 462, 332. Compare *Ward v. Duncombe*, [1893] A. C. 369, 394; 8 Digest 462, 333.

⁶ *In re Kinahan's Trusts*, [1907] 1 I. R. 321; 8 Digest 461, 328, i.

ARTICLE 17.

General Rule as to Equitable Interests.

Subject to the above qualifications the general rule is that equitable interests have in general the same incidents and attributes as have the corresponding legal interests.

This general rule is shortly summed up by the maxim :
“Equity follows the law.”

At first the tendency of the Court of Chancery seemed to be to treat equitable interests in property as merely rights of action of the equitable owner against the legal owner.¹ Gradually, however, as the principles affecting them became settled, the court held that, save as to certain points, equitable estates were to have the same incidents as legal estates.² And this rule was not confined to equitable estates arising by way of express trust but extended to those arising out of legal mortgages,³ and even to such equitable rights as that to set aside a legal conveyance obtained by undue influence or fraud.⁴

In the same way, equity followed the law as regards the quantity of interest which an equitable owner might have in land. Thus he might have an equitable interest in fee simple, or in tail or for life or for years. Again, his interest might be in possession or in remainder. And in each case the incidents of his interest would be the same, with certain exceptions, as those attaching to a corresponding legal estate. Section 1 of the Law of Property Act, 1925, has reduced the number of possible legal estates in land to two ; namely, a fee simple absolute in possession and a term of years absolute. But it has not curtailed the possible kinds of equitable interests. The same equitable interests may exist since 1925 as could exist before 1926, and, generally speaking, they have the same incidents as if they were legal estates.

¹ See *Sir Moyle Finch's Case* (1590), 4 Inst. 86.

² *Hopkins v. Hopkins* (1739), West t. Hard. 606 ; 43 Digest 624, 637 ; *Burgess v. Wheate* (1759), 1 Eden. 177 ; 43 Digest 624, 638.

³ *Casborne v. Scarfe* (1737), 1 Atk. 603 ; 35 Digest 343, 353.

⁴ *Stump v. Gaby* (1852), 2 De G. M. & G. 623 ; 25 Digest 281, 1063.

It follows also from the principle stated in the Article that equitable interests can be settled, mortgaged, and disposed of, precisely in the same way as legal interests. A legal interest can be validly conveyed to a grantee unknown to him and so can an equitable interest.¹ Again, a bankrupt could not give a good title to legal realty nor could he to equitable.² Moreover, an equitable interest on the death of the owner devolves precisely as would the legal interest, being equally affected, before 1926, by any peculiar custom of descent, like the characteristic of gavelkind or borough-English.³

ARTICLE 18.

Purposes for which Equitable Interests and other Rights were Created.

The Court of Chancery being a Court of Conscience, the equitable interests and other equitable rights created by it were created primarily for one or other of three purposes :

- (1) To protect confidences ;
- (2) To promote fair dealing ; and
- (3) To prevent oppression.

It used to be said that the Court of Chancery, as a Court of Conscience, had jurisdiction over matters arising out of accident, fraud, and things of confidence. It is open to doubt whether this ever was a sufficient statement of the various grounds upon which the court conferred equitable rights. It certainly is not now, unless perhaps the phrase "things of confidence" is taken in the vague sense referred to in Article 10. It is submitted, in any case, that the above Article sets out these purposes more accurately and affords a means of roughly classifying equitable rights.

¹ *In re Pidcock* (1907), 51 Sol. J. 574 ; 35 Digest 261, 208.

² *Official Receiver v. Cooke*, [1906] 2 Ch. 661 ; 5 Digest 730, 6329. See Bankruptcy Act, 1914, sect. 45 ; 1 Halsbury's Statutes 650.

³ *In re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655 ; 13 Digest 104, 1332.

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contrary is shown that the person who was entitled to make such a declaration intended the property to be held for his own benefit.

(3) A *constructive* trust arises where a person becomes possessed of property through such an abuse of confidence reposed in himself or another as will induce the court to hold that in conscience he is bound to hold it for the benefit of the person injured by the breach of confidence.

(4) Trusts, whether declared, presumed, or constructive, in which the person in whose favour the trust arises is the person who provided the property or equitable interest vested in the person bound by the trust are called *resulting trusts*.

Thus, if A. conveys Blackacre to B. and directs him to hold it for the benefit of B. for life and afterwards for the benefit of B.'s children, A. creates a declared trust. If A., however, bought Blackacre and had it conveyed, not to himself, but to B., *primâ facie* B. would be a presumptive trustee of Blackacre for A. This would also be a resulting trust, since B. would be a trustee of Blackacre for A., who provided the funds to purchase it. Lastly, if B., being trustee of a leasehold for A., obtained during its continuance a renewal of such lease for his own benefit, he would be constructive trustee of the renewed lease for A.

No endeavour is here made to define a trust. Most of those writers or judges who have attempted such a definition have done little to assist the world to a clear conception of what a trust is.

The better course is to point out first merely how trusts arise and subsequently deal *seriatim* with the characteristics of each class.

The distinction between declared and presumed trusts is merely one as to evidence. They are both based on the intention to create a trust, but in the declared trusts

the intention is evidenced by the language or conduct of the parties, while in the presumed trusts it is presumed from the relationship between the parties. The late Mr. Ashburner on this account discussed it under the heading of Interpretation of Trusts.¹ This seems hardly correct, since there can be no question of interpretation where there is no declaration to interpret.² The trust is presumed simply because it is not declared. Still, this arrangement is better than that which places the presumed and constructive trusts together under one head, as distinguished from the declared trusts. The real distinction is between the declared and presumed trusts and constructive trusts, since the first two are based on the intention, while the third is created by the court independently of (and usually in opposition to) the intention of the party bound by it.

The name of "declared" trusts is adopted here in preference to "express" trusts, which is that commonly adopted, because the term "express" trust is used in very different senses. Thus, according to Lord NOTTINGHAM,³ express trusts include both the declared and presumed trusts. On the other hand, the term is also used to cover all kinds of trusts, however they arise, where the trustee is not entitled to plead the Statute of Limitations in answer to the charge that he is still in possession of the trust property.

The term "presumed" trust is justified, so far as authority is needed, by the dictum of Lord NOTTINGHAM above referred to. Besides this it seems suitable as fixing the attention of the reader on the cardinal difference between the modes in which presumed and declared trusts arise.

Paragraph (3).

The term "constructive" trust, which is frequently used to include presumed trusts, seems to be appropriate only to trusts created by the policy of the law. "Con-

¹ Ashburner, *Equity*, 2nd edn., pp. 103 *et seq.*

² See *Birmingham, Dudley and District Banking Co. v. Ross* (1887), 38 Ch. D. 295; 19 Digest 47, 261.

³ *Cook v. Fountain* (1676), 3 Sw. 585, at p. 591; 43 Digest 553, 22.

structive," in legal phraseology, is opposed to "actual."¹ And the third class of trust is based on this—that there has been no actual trust, but the court for its own purposes treats the transaction as if there had been.

Paragraph (4).

The term "resulting" trust, besides being used in the meaning given it in the Article, is also employed to describe the classes of trusts above called presumptive and constructive. There is this much to be said for this use of the term, that it draws attention to the fact that both these classes of trusts are outside the provisions of section 53 of the Law of Property Act, 1925,² which requires declared trusts of certain kinds to be evidenced in writing. And, besides, most presumptive and constructive trusts are also resulting in the sense stated in the Article. But so are many declared trusts. The consequence of using the term in two senses is that declared resulting trusts are liable to become confused with trusts arising by implication or construction of law.³ Accordingly, the name "resulting" trust is used in this work in the one sense only—that is, as describing a trust where the benefit goes back to the person who provided the trust property whether by express limitation or by operation of law.

¹ *E.g.*, constructive notice, *ante*, Art. 12.

² 15 Halsbury's Statutes 234.

³ For a flagrant example of that and other confusions, see *In re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655; 13 Digest 104, 1332.

BOOK I (A): PART I.

ACTUAL TRUSTS.

Section I. Declared Trusts.

ARTICLE 20.

Kinds of Declared Trusts.

The law relating to declared trusts varies according to the objects of the trust. If those objects are the benefit of ascertained or ascertainable individuals or the advancement of purposes which the law does not regard as for the general benefit the trust is called a *private trust*. If the objects are not the benefit of ascertained or ascertainable persons but the advancement of purposes which the law does regard as for the general benefit they are called *charitable trusts*.

Private trusts for the advancement of a purpose, not regarded by the law as for the general benefit, will be considered in Article 30.

It is often very difficult to decide whether any particular trust is private or charitable. For the present we may assume that every lawful trust, whatever may be the objects it is intended to benefit, is a private trust unless the object is the advancement of a purpose regarded by the law as for the general benefit of the community. Later we shall consider what purposes are so regarded.

A. PRIVATE TRUSTS.

ARTICLE 21.

Divisions of Subject.

The law relating to declared private trusts will be considered under the following heads :

- (i) The formation of a trust ;
 - (ii) Trustees : their kinds, appointment, retirement, and estate ;
 - (iii) Trustees : their duties, powers, and privileges ;
 - (iv) Cestuis que trust and their rights ; and
 - (v) Breach of trust.
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A. PRIVATE TRUSTS.

CHAPTER 1.

FORMATION OF A TRUST.

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ARTICLE 22.

Parties necessary to the Formation
of a Trust.

(1) To the constitution of a declared private trust, other than one not for the benefit of individuals, three parties are necessary :

- (i) The party who owns the property which on the constitution of the trust is directed to be held for the benefit of certain persons. He is called the *settlor*.
- (ii) The party who is to hold the property for this purpose. He is called the *trustee*.

- (iii) The party for whose benefit the property is to be held. He is called the *cestui que trust*, or *beneficiary*.

(2) The settlor is the person entitled to direct for whose benefit the property is to be held. His direction is called the *declaration of trust*, and where this is in writing the writing is called the *trust instrument*. The property is called the *trust property*. The interest in it taken by the *cestui que trust* is called the *beneficial estate*; that taken by the trustee the *trustee's estate*.

(3) Each of the parties to a trust may consist of several individuals, while, on the other hand, one individual may discharge the functions of any two or of all three parties, subject to this limitation, that the same individual cannot be at the same time sole trustee and sole *cestui que trust*.

Paragraphs (1) and (2).

If, for instance, A. conveys Blackacre to B. to hold the same for the benefit of C., and B. by accepting Blackacre thereby agrees so to hold it, A. is then the settlor, B. is the trustee, and C. is the *cestui que trust*. The direction of A. so to hold Blackacre is the declaration of trust, and if it is in writing—as in this instance it must be¹—the writing will be called the trust instrument. Blackacre is the trust property, the interest taken by B. is the trustee's estate, while that taken by C. is the beneficial estate.

It is to be noted that the trust property may itself be an equitable interest. Thus, in the above example, Y. may be trustee of Blackacre for A. In this case A.'s interest in Blackacre is merely equitable, the legal estate being in Y. As A. has only an equitable interest in Blackacre, that is all he can transfer to B., who would accordingly

¹ See *infra*, Article 23.

be trustee of the equitable interest for the benefit of C. For this reason it seems to be less misleading to call the estate taken by the trustee the trustee's estate, and that taken by the cestui que trust the beneficial estate, than to apply to them respectively the terms "legal estate" and "equitable estate," as is usually done.

Where the trust property is equitable, the person by law entitled to declare the trust is the owner of the equitable interest, and not the person entitled to the legal estate.¹

Paragraph (3).

"Each of the parties to a trust may consist of several individuals." Thus, in the above example, A. and his wife may have a joint power of appointment over Blackacre and may jointly appoint it to the trustee. Here there are two settlors. And they may convey not to B. solely, but to B., F., and G. jointly, and direct B., F., and G. to hold it, not for the benefit of C. solely, but for C. for life and then for C.'s children. In this case there would be (as in practice there almost invariably are, at least when the trust is first created) several trustees and several cestuis que trust. On the other hand, A., instead of conveying Blackacre to B., may declare himself trustee of it² for C. in fee simple, in which case A. would be both settlor and trustee, or he may declare himself trustee of it for himself for life and then for C. in fee simple, in which case he would be settlor, trustee, and one of the cestuis que trust. Any number or combination of parties is legal. This statement, however, is subject to two modifications. Firstly, the same person cannot be at the same time sole trustee and sole cestui que trust, for he then has the whole interest in the trust property in himself, and he is not trustee of it but both legal and equitable owner.³ This exception extends to cases where the legal estate is vested in two or more individuals if the same individuals each take precisely the like extent of interest in the equitable estate, even though

¹ *Kronheim v. Johnson* (1877), 7 Ch. D. 60; 43 Digest 557, 80.

² See *infra*, Article 28.

³ *Selby v. Alston* (1797), 3 Ves. 339; 43 Digest 667, 984.

the legal estate is vested in them as joint tenants and the equitable interest as tenants in common.¹

Secondly, section 34 of the Trustee Act, 1925,² imposes a limit on the number of persons who may be trustees of a private trust of land. In the case of settlements and dispositions on trust for sale of land, made or coming into operation after 1925, the number of trustees must not in any case exceed four, and where more than four persons are named as trustees the four first named (who are able and willing to act) are alone to be the trustees. In the case of settlements made before the commencement of the Act and in existence on 1st January, 1926, if there were on that date more than four trustees they may all continue to act, but no new trustee can be appointed until the number is reduced below four, and thereafter the number must not be increased beyond four.³ Conversely, there are now certain statutory provisions to prevent a sole trustee (other than a trust corporation) of a settlement of land or of a trust for sale of land from receiving capital money.⁴

ARTICLE 23.

Declaration of a Trust to Operate Immediately.

When a declaration of trust is intended to come into operation at once it may be made in writing, by word of mouth, or by conduct ; subject to this restriction, that if the trust property consists of land or any interest in land, then (subject to Article 25) before the court will

¹ *In re Selous, Thomson v. Selous*, [1901] 1 Ch. 921 ; 43 Digest 667, 986.

² 20 Halsbury's Statutes 128.

³ This provision is confined to trusts of *land* ; and even then it does not apply to charitable trusts, or trusts of a term of years absolute for raising money or securing annual sums charged on land ; 20 Halsbury's Statutes 128.

⁴ Settled Land Act, 1925, sects. 18, 94 ; 17 Halsbury's Statutes 854, 929. Trustee Act, 1925, sects. 14, 37 ; 20 Halsbury's Statutes 107, 133. Law of Property Act, 1925, sect. 27 ; 15 Halsbury's Statutes 202.

enforce such trust the terms of it must be reduced into writing, and such writing must be signed by some person who is able to declare such trust.

Trusts *inter vivos*, whether of land or goods, were originally averrable—i.e., they could be validly declared without writing of any kind. Thus, if A. declared himself by word of mouth a trustee of Blackacre for the benefit of himself for life and afterwards for the benefit of his children, this trust could be enforced against him or his heir, provided satisfactory evidence could be produced to the court of the declaration. This rule still applies to pure personalty.¹ But by section 53² of the Law of Property Act, 1925, which repeals but in substance re-enacts sections 7 and 8 of the Statute of Frauds, 1677, “a declaration of trust respecting land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.” But this provision does not affect “the creation or operation of resulting, implied or constructive trusts,” that is, what we have called earlier presumed and constructive trusts.

Trusts arising by conduct within this Article do not include presumptive trusts, which arise by implication of law and which are confined to the classes set out in Articles 83 and 84, *infra*. The trusts declared by conduct, here referred to, are trusts arising through the settlor doing such acts as amount to clear evidence that he intends to constitute himself or another a trustee of his property for some one else.³ Accordingly trusts can be proved solely by conduct only where the property is not land ; since all declared trusts of land are, as stated in the Article, to be evidenced in writing.

The trust is merely to be proved, not declared, in writing. Therefore, if an oral declaration is afterwards reduced to writing, this will be sufficient to satisfy the

¹ *McFadden v. Jenkins* (1842), 1 Ph. 153 ; 43 Digest 555, 51.

² 15 Halsbury's Statutes 234.

³ See *O'Flaherty v. Brown*, [1907] 2 I. R. 416.

statute,¹ and the trust will operate or take effect, not from the time it was reduced into writing, but from the time it was orally declared.²

The writing is to be signed by the person entitled to declare the trust, *i.e.*, the owner of the property or equitable interest of which the trust is declared.³ Where declarations of trust are not communicated to the cestuis que trust, the court will require evidence that the settlor really intended to create a binding trust.⁴

ARTICLE 24.

Declaration of a Trust to be Ambulatory till Death.

Where a declaration of trust is intended to be ambulatory till the death of the settlor, then, whatever the nature of the property of which the trust is to be constituted may be, the language used in the declaration must be reduced into writing, and such writing must be executed as a will according to the requirements of the Wills Act, 1837,⁵ or (subject to the following Article) the declaration will be totally void.

An instrument is said to be ambulatory till death when it has no binding effect in law until the death of the maker. Thus, if A., by writing, declares himself trustee of Blackacre for his own benefit for life and then for the benefit of his children, the children immediately take equitable interests in Blackacre, though these do not vest in enjoy-

¹ *Gardner v. Rowe* (1828), 5 Russ. 258; 5 Digest 698, 6137. See also *New, Prance and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19, affirmed [1899] A. C. 419; 43 Digest 564, 135.

² *In re Holland, Gregg v. Holland*, [1902] 2 Ch. 360; 40 Digest 470, 188.

³ *Dye v. Dye* (1884), 13 Q. B. D. 147; 43 Digest 557, 82; *Kronheim v. Johnson*, *supra* (1877), 7 Ch. D. 60; 43 Digest 557, 81.

⁴ *In re Cozens*, [1913] 2 Ch. 478, at p. 486; 43 Digest 563, 129.

⁵ 20 Halsbury's Statutes 436.

ment until A. dies. But if A. by *will* devises Blackacre to C. and D. in trust for his children, the children have no interest, legal or equitable, in Blackacre till A.'s death. Until that time A. can deal with the property as he likes. He can sell it, or commit waste on it, without anyone's consent. Not only so, but he can at any time revoke the will and devise Blackacre for other purposes than the benefit of his children.

Formerly section 7 of the Statute of Frauds, 1677, applied to declarations of trusts after death, but now the law as stated in the Article depends on section 9 of the Wills Act, 1837.¹

The commonest example of attempts to evade the principle stated in the rule arises in the case of testators attempting to create secret trusts. These will be considered in the note to the next Article.

ARTICLE 25.

Fraudulent Repudiation of a Trust.

Where a person has obtained possession of property by undertaking or consenting to hold it upon trust he will not be permitted subsequently to repudiate the trust and hold the property for his own benefit on the ground that the terms of the trust were not reduced into writing, as required by the Law of Property Act, 1925,² or that no will declaring the terms of the trust was made, as required by the Wills Act, 1837.³

The principle stated in this Article is an application of the old doctrine that equity will not allow a technical rule to be pleaded in order to protect a fraud. Accordingly it applies only where the person taking the property has taken it in the character of trustee. This he may do either by expressly agreeing with the person giving it to

¹ 20 Halsbury's Statutes 441.

² 15 Halsbury's Statutes 216.

³ 20 Halsbury's Statutes 441.

him to hold it on trust or by accepting the property knowing he is to take it as trustee. Where he has not taken it in the character of trustee, there is nothing contrary to conscience in his setting up the Wills Act or the Statute of Frauds against any attempt to bind the property with trusts. Thus if A. conveys Blackacre to B. without receiving value, but also without intimating to B. that he intends B. to hold it in trust for A., there is nothing to prevent B. pleading the Statute of Frauds if A. or A.'s personal representative subsequently alleges that such was A.'s intention.¹ In the same way, if A. bequeaths £10,000 to B., B. appearing on the face of the will to take beneficially and B. not having during A.'s lifetime undertaken to hold it as trustee, it is open to B. to set up the Wills Act if after A.'s death a paper not executed as a will is found showing that B. was intended to hold it on certain trusts. He can set up the Wills Act, and hold the legacy for his own benefit.²

A striking example of an application of this Article to trusts *inter vivos* is the case of *Rochejoucauld (Duchesse de) v. Boustead*.³ There the defendant was the agent of the plaintiff for certain estates belonging to the latter. He and she entered into a verbal agreement whereby he became nominal purchaser of these estates, but in fact was intended to become trustee of them for her. For several years he rendered to her accounts, but finally he ceased to do so, and set up as a defence to an action brought by her that if there was any trust it could not be enforced as it had never been reduced into writing, as required by section 7 of the Statute of Frauds. It was held that since he had received the estates as trustee he could not plead the statute in order to enable him to repudiate the trust.

Cases of the application of this rule are more frequent under wills where it is relied upon for the purpose of evading the Wills Act, 1837,⁴ by creating secret trusts not

¹ *Fowkes v. Pascoe* (1875), L. R. 10 Ch. 343, at p. 348; 43 Digest 653, 876.

² *Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531; 43 Digest 601, 487; *Re Downing* (1889), 60 L. T. 140; 43 Digest 597, 458.

³ [1897] 1 Ch. 196; 43 Digest 558, 87.

⁴ 20 Halsbury's Statutes 436.

declared on the face of the will. These cases form themselves into four groups :

(i) Cases where the legatee or devisee is described in the will as a trustee of the property bequeathed or devised, but the trusts are not set out there. Cases of this kind depend on whether or not the legatee or devisee was informed, before or at the time when the will was made, of the particular trusts on which the testator desired him to hold the property. If he was not so informed those trusts fail, and he will hold on trust for the testator's residuary legatee or devisee or, as the case may be, the persons entitled under an intestacy. On the other hand, if he was so informed it is now definitely established, after a period of some doubt, that he must carry out the trusts which have been communicated to him.¹

(ii) Cases where the legatee or devisee is not described in the will as a trustee, but was informed by the testator that he was intended to take as a trustee. Here the position is the same. If the legatee or devisee was informed, before or at the time when the will was made, of the particular trusts intended, he is bound to carry them out ; if he was not, he is a trustee of the property for the residuary legatee or devisee or persons entitled under an intestacy.²

(iii) Cases where there are several joint legatees or devisees, some of whom were, and some of whom were not, informed that they were to be trustees. Here, if the information was given to one of the joint legatees or devisees before the will was made, the shares of all the joint legatees or devisees go as if they all had been so informed ; while if the information was not given until after the will was made, only the shares belonging to those who received the information are affected.³ This distinction is based on the supposition that it was the undertaking of the one joint legatee to act as trustee before the will was made that induced the testator to make his will as he did.

¹ *Re Blackwell, Blackwell v. Blackwell*, [1929] A. C. 318 ; Digest Supp.

² *Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531 ; 43 Digest 601, 487. See also *Re Keen, Evershed v. Griffiths*, [1937] Ch. 236 ; [1937] 1 All E. R. 452 ; Digest Supp.

³ *Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237 ; 43 Digest 602, 490.

(iv) Cases where there are several legatees or devisees who take as tenants in common, and some of whom only were informed of the trust. Here, whether the information was given before or after the will was made, the shares of those only who were informed of the trust are bound by it.¹

On the same principle, when a person induces another not to make a will or to revoke a will already made by undertaking to apply the property which will in that case come to him, he will not after the death of the person so induced be permitted to repudiate the undertaking.²

ARTICLE 26.

Declaration of Trust : The Three Certainties.

(1) No formal language is necessary to constitute an effective declaration of trust, but the language used must make it certain :

- (i) That the settlor intended to constitute a trust binding by law on himself or on the person to whom the property was given ;
- (ii) That he intended to bind definite property by the trust ;
- (iii) That he intended to benefit definite persons in a definite way.

If there is a failure as to (i) no trust is constituted, and so the property belongs beneficially to the settlor or to the person to whom it is transferred as the case may be ; if as to (ii) or

¹ *Re Stead, Wilham v. Andrew*, [1900] 1 Ch. 237 ; 43 Digest 602, 490.

² *Re Gardner*, [1923] 2 Ch. 230 ; 43 Digest 598, 465.

(iii) a trust is constituted but it is void for uncertainty, and so the trust property results to the settlor or his representatives.

(2) Where the declaration takes the form of an agreement or direction for the subsequent execution of a proper trust instrument (iii) will be satisfied by a mere general indication of the settlor's intentions in that behalf.

Where the declaration takes the form of such an agreement or direction the trust declared by it is called an *executory trust*. Where the declaration itself sets out fully and formally the trust on which the trust property is to be held the trust declared by it is called an *executed trust*.

Paragraph (1).

The three points which the language of the declaration must make certain are commonly called the *three certainties*.

As to (i), uncertainty as to this usually arises through the settlor not declaring that the person taking the property *shall* hold it on the trusts declared but "praying" or "desiring" him so to do. Thus, for example, in *Re Downing*,¹ a testator left his property absolutely to A. and B., "in the full confidence that they will carry out my wishes in respect thereof." It was held here that, in the absence of evidence that A. and B. had undertaken to carry out such wishes—which undertaking would have brought them within the preceding Article—no trust was imposed on A. and B., who therefore took beneficially. Again, in *Re Oldfield, Oldfield v. Oldfield*,² a testatrix, after leaving property to her two daughters absolutely as tenants in common, added, "My desire is that each of my said two daughters

¹ (1889), 60 T. L. 140 ; 43 Digest 597, 453.

² [1904] 1 Ch. 549 ; 43 Digest 585, 339.

shall during the lifetime of my son pay to him one-third " of the income accruing from the property given. It was held that no trust in favour of the son was created, and the daughters took the whole property beneficially.

Formerly the court was inclined to hold that such expressions gave rise to trusts which, owing to the form of the expression, were called *precatory trusts*. Since the case of *Re Adams and Kensington Vestry*,¹ the tendency has been the other way. It is now settled that where a gift is made in words which clearly confer the property on a person, other words following such words must be equally clear before the court will hold that they, in effect, take away the property previously given.² In other words, it is necessary to consider the whole instrument in which the so-called precatory words occur and to decide whether the settlor or testator intended by them merely to indicate his reliance on the discretion of the donee or whether, on the other hand, he intended to bind the donee by an imperative trust. The question, in short, is a question of construction.

Sometimes difficulty also arises where what appears to be a special power to appoint among a class is given to a person who fails to exercise it. There may then occur the question whether members of the class can claim the property which might have been appointed among them ; and whether they can do so depends on whether a trust in their favour has been created. Theoretically, the essential difference between a power and a trust is obvious ; for a power is essentially discretionary and may be exercised by the donee or not as he chooses, but a trust is imperative. But difficulty in distinguishing between the two may be created by the fact that words which on the face of them appear to create a mere power may be held to create a trust. There is then said to be a *power in the nature of a trust*. The difference between a mere power and a power in the nature of a trust is important because where the donee of a mere power does not exercise it the court will respect his discretion and will not interfere, but

¹ (1884), 27 Ch. D. 394 ; 43 Digest 570, 581, 296.

² *Hill v. Hill*, [1897] 1 Q. B. 483, at p. 487 ; 43 Digest 583, 314.

where there is a power in the nature of a trust and the donee fails to appoint the property among the objects of it the court will take upon itself his duties in order that the intended objects shall not be pre-judiced, and, following the maxim that *equality is equity*, the court will divide the property equally among the members of the class although the donee himself, had he wished, might have distributed unequal shares. The question of whether there is a mere power or a power in the nature of a trust is one of construction. If it appears that the intention is that the donee may appoint or not as he pleases, there will be no trust, but there will be a trust if the intention appears to be that he shall have power simply to *select* out of the class those who shall take.¹ In *Burrough v. Philcox*.² Lord COTTENHAM said : " Where there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the court will carry into effect the general intention in favour of the class." On that principle it has been held that there can be no trust if there is a gift over in default of appointment, and this is so even though the gift over is void, because the mere fact that the donor contemplated a default of appointment negatives a general intention in favour of the class.³ Even in the absence of a gift over there will not necessarily be a trust. The tendency of the courts in modern times is against inferring trusts in these cases,⁴ unless the general intention to benefit the class is clear.⁵

The certainties required under (ii) and (iii) are not peculiar to declarations of trust but are necessary to all grants and devises. It is clear that if it is not certain what property passes under an instrument or to whom it passes it is impossible to carry out the transaction. The

¹ *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84 ; 43 Digest 570, 195 ; *In re Atkinson* (1911), 80 L. J. Ch. 370 ; 43 Digest 588, 378.

² (1840), 2 My. & Cr. 72, at p. 92 ; 43 Digest 594, 430.

³ *Re Sprague* (1880), 43 L. T. 236 ; 40 Digest 784, 3152.

⁴ See Underhill on Trusts, 9th edn., p. 24.

⁵ See *Re Weekes' Settlement*, [1897] 1 Ch. 289 ; 44 Digest 530, 3468 ; *Re Llewellyn's Settlement*, [1921] 2 Ch. 281 ; 37 Digest 531, 1228 ; *Re Coombe*, [1925] Ch. 210 ; 37 Digest 527, 1181.

court applies rules for the purpose of solving as far as possible ambiguities on these points, but such rules belong rather to the principles of interpretation of written instruments than to equity.

The important point to note is that where there is a failure of the first certainty there is no trust, and so, if the property has been transferred, the person to whom it has been transferred takes it beneficially. The cases *Re Downing*¹ and *Re Oldfield, Oldfield v. Oldfield*² are examples of this. On the other hand, where the first certainty is present but there is a failure as to the second or third the trust fails. If the failure is as to the second certainty, no property is affected by the trust, the intention of the intended settlor failing to operate. If the failure is as to the third certainty, then, if property has been vested in a trustee, he, being a trustee, cannot repudiate the trust, while owing to the uncertainty of the trust he cannot execute it. In this case he holds it for the benefit of the settlor, or if the settlor is dead, for those who succeeded to his rights. The case of *Re Boyes, Boyes v. Carritt*³ is an example. This is also an example of what is meant by a resulting trust.

Paragraph (2).

By an executory trust is not meant a trust that is executory in the sense in which that word is used in respect to contracts—i.e., to be performed in the future. All trusts are executory in that sense. It is executory in the sense that “it is to be executed by the preparation of a complete and formal settlement carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated by the settlor.”⁴ In the words of Lord ST. LEONARDS in *Egerton v. Earl Brownlow*,⁵ in the case of an executed trust “the settlor has been his own conveyancer.” In the

¹ *Supra*.

² *Supra*.

³ (1884), 26 Ch. D. 531; 43 Digest 601, 487.

⁴ *Per* Lord CAIRNS in *Sackville-West v. Viscount Holmesdale* (1870), L. R. 4 H. L. 543; 43 Digest 626, 656.

⁵ (1853), 4 H. L. Cas., at p. 210; 43 Digest 609, 536.

case of an executory trust it may be said that he has only given his conveyancer instructions to draft a settlement.

Thus, if the settlor directs his trustees that certain property shall be settled on A. as "counsel shall advise," this is a good executory trust.¹ So is a direction that certain freeholds, leaseholds, furniture, and plate "shall follow the barony of B., as nearly as practicable, and according as the trustees shall think proper or counsel shall advise."²

Executory trusts usually occur either in marriage articles—that is, informal written agreements made in contemplation of marriage as to the terms of the marriage settlements afterwards to be executed—or in wills, where directions are very frequently given that property left to women shall be "strictly settled."

ARTICLE 27.

Interpretation of Declarations of Trust.

In interpreting declarations of trust where the trust declared is executed, the court will construe the words and limitations contained in the declaration strictly according to their ordinary meaning, but where the trust declared is executory it will construe them in the sense in which it presumes the settlor would have expressed himself had he expressed his intentions fully and known the legal meaning attached to technical words and the technical rules as to the limitation of estates.

As was said by Lord WESTBURY in *Sackville-West v. Viscount Holmesdale*,³ "In construing the words creating

¹ *White v. Carter* (1766), 2 Ed. 366; 40 Digest 450, 366.

² *Sackville-West v. Viscount Holmesdale*, *supra*. See also examples in note to next Article.

³ *Supra*.

an executory trust, a Court of Equity exercises a large authority in subordinating the language to the intent.”¹

A good example of this is the case of *In re Johnston-Cockerell v. Earl of Essex*.² There a testatrix left certain plate and a leasehold house directly to “Lord E. and to his successors, and to be enjoyed with and to go with the title”; and then she bequeathed to her trustees certain other chattels upon trust to select and set aside part of them “to be held and settled as heirlooms, and to go with the title.” The first of these bequests, being a direct gift to Lord E. and his successors, had to be interpreted according to law, and it was held that the effect in law of the bequest was to vest the chattels absolutely in Lord E. The second gift was by way of executory interest, and though neither in law nor in equity can chattels be made to accompany a title, yet in equity they can be held in successive interests. The court therefore directed the testatrix’s intention to be carried out as far as possible by a settlement giving merely a life interest to Lord E., with limitations over making the chattels descend with the title as far as the rules of equity permitted.

Again, the court, in interpreting the limitation arising under an executory trust coming into operation before 1926, would not apply the rule in *Shelley’s Case*³ so as to give a cestui que trust the fee simple or a fee tail where it was the clear intention of the settlor that he should only take a life interest.³ This particular illustration of the attitude of equity towards an executory trust has lost much of its importance since 1925, because with regard to instruments coming into operation on or after 1st January, 1926, the rule in *Shelley’s Case* is abolished.⁴ But there is a closely analogous rule which may still be important. It is the rule that if the strict construction of the words of an executory trust would render the trust

¹ See the different interpretations put upon limitations in the same will according as they arose under an executory or executed trust, *In re Beresford-Hope*, [1917] 1 Ch. 287; 43 Digest 611, 550.

² (1884), 26 Ch. D. 538; 44 Digest 922, 7798.

³ *Glenorchy v. Bosville* (1733), Cas. t. Talb. 3; 43 Digest 608, 531.

⁴ Law of Property Act, 1925, sect. 131; 15 Halsbury’s Statutes 310.

illegal the court will depart from a strict construction in order to give effect to the settlor's intentions. Thus, in an old case,¹ land was devised to a corporation in trust to convey to A. for life, and after A.'s death to his first son for life, and then to the first son of that first son for life, with remainder (in default of male issue of A.) to B. for life, and to his sons and their sons in like manner. The rule against perpetuities clearly would have been violated had this devise been construed strictly. But the devise created an executory trust; and Lord Cowper held that the testator's intentions should receive effect so far as was legally possible. He directed, therefore, that the devise should operate so as not to infringe the perpetuity rule and that all the sons of A. already born at the testator's death should take estates for life with limitations in tail to their unborn sons.

As already said, executory trusts usually arise under either wills or marriage articles. In whichever way they arise the interpretation is the same, save that in those that arise under marriage articles there is a presumption in the absence of evidence to the contrary² that it was intended to provide for the issue of the marriage.³ No such presumption arises in the case of executory trusts in wills unless, as frequently happens, the property is directed to be settled only on the marriage of the cestui que trust.

ARTICLE 28.

Completely Constituted Trusts.

(1) A trust which has been declared is not completely constituted until the settlor has divested himself of the trust property for the benefit of the cestuis que trust.

¹ *Humberston v. Humberston* (1717), 1 P. Wms. 332; 44 Digest 553, 3708.

² *Howell v. Howell* (1751), 2 Ves. 358.

³ *Sackville-West v. Holmesdale*, *supra*.

(2) In trusts declared *inter vivos* the settlor may divest himself of the trust property either (i) by the settlor constituting himself a trustee of it, or (ii) by his assuring or doing all in his power to assure the trust property to other persons as trustees. In trusts declared by will the trust property always is divested from the moment the will comes into operation, *i.e.*, from the death of the settlor.

(3) When the trust property is divested for the benefit of the cestuis que trust, then, subject to Article 31, every cestui que trust, whether or not he gave value for the constitution of the trust, is entitled as an equitable owner to have the performance of the trust enforced.

Paragraphs (1) and (2).

The test whether or not a trust is completely constituted is whether or not the settlor has divested himself at law or in equity of the ownership of the trust property. At law there is only one way of doing this, that is, by executing a proper assurance. But in equity he may as effectually divest himself of the ownership by declaring himself a trustee of the property for the cestuis que trust. In order to do this it is not necessary to "use the words 'I declare myself a trustee,' but he must do something which is equivalent to it and use expressions which have that meaning, for however anxious the court may be to carry out a man's intentions it is not at liberty to construe words otherwise than according to their proper meaning."¹ Thus in *Gee v. Liddell*² a testator left A. a legacy of £2,000, at the same time authorising his executor B. to retain it

¹ *Per* JESSEL, M.R., in *Richards v. Delbridge* (1874), L. R. 18 Eq. 11; 43 Digest 560, 187.

² (1866), 35 Bead. 621; 43 Digest 567, 157.

till B.'s death, B. to pay to A. interest at the rate of 4 per cent. B., being satisfied that the testator intended to leave A. £3,000, declared that he would see to it that A. should have the extra £1,000. Later B. signed a memorandum entitled in the will of the testator and stating that B. paid A. £120 each year, "being interest at 4 per cent. on £3,000," and afterwards he signed another memorandum recording his previous declaration. He did in fact pay £120 per annum to A. till his death. It was held that he constituted himself trustee of the additional £1,000.

Formerly, when many things such as policies of insurance, debts, etc., were not alienable at law, equity was often compelled to go further than this, and to hold that where a thing was inalienable at law, if the settlor had done all he could to alienate it this amounted to a transfer in equity. Though this principle is of less importance now than formerly, it is still good law. Thus in *Keke-wich v. Manning*¹ certain residuary property, only transferable in the books of the bank, was left by will to A.'s mother for life and then to A. herself absolutely. A. married in her mother's lifetime. Before her marriage she assigned her reversionary interests in the residuary property upon certain trusts. It was held that, as she was not owner in possession and so was not entitled to transfer the property in the books of the bank, she had done all she could to transfer it and so there was a perfect trust.

On the other hand, where a settlor could have completely transferred the property if he had chosen, but has failed to do so through not adopting the proper mode of transfer, the court will not perfect the gift by holding either that the property is transferred in equity or that the imperfect gift amounts to a declaration of trust by the settlor in favour of the trustees or *cestuis que trust*.² Here equity merely follows the law.³ But it is to be

¹ (1852), 1 De G. M. & G. 176 ; 43 Digest 568, 172.

² *Antrobus v. Smith* (1806), 12 Ves. 39 ; 8 Digest 454, 275 ; *Milroy v. Lord* (1862), 4 De G. F. & J. 264 ; 8 Digest 499, 634.

³ *Cochrane v. Moore* (1890), 25 Q. B. D. 57 ; 25 Digest 508, 47.

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³ *Cochrane v. Moore* (1890), 25 Q. B. D. 57; 25 Digest 508, 47.

remembered that at law a verbal gift is sufficient to transfer the ownership of chattels which are already in the possession of the donee.¹

No questions such as these arise when the trust is declared by will, since a will is both at law and in equity a complete assurance of the property comprised in it. Moreover, there is a case in which an imperfect voluntary transfer of property, whether real or personal, made by a person in his lifetime may be rendered effectual on his death; and that is where the donor appoints the donee to be his executor or one of his executors. In that case the vesting of the property in the donee as executor completes the donee's title at law.² The same result follows if the donee becomes administrator on the donee's intestacy.³ In these cases, however, it is essential that the donor should have intended to make a present gift and that such intention should have continued until the time of his death.⁴ A mere promise to make a gift in the future will not suffice, and it is also necessary that the property comprised in the gift should be definite.⁵

Paragraph (3).

Usually the act of the settlor which vests the trust property in trustees is also sufficient to transfer the equitable interest in the trust property to the cestuis que trust. This is always the case where the settlor declares himself trustee, since if the effect of so declaring himself is not to transfer the equitable interest to the cestuis que trust his declaration has no effect whatever and is absolutely nugatory. But sometimes property is effectually vested by a settlor in trustees without any right of enforcement in equity passing to the cestuis que trust. Examples of such cases will be found under Article 30.

With these exceptions, however, the effect of vesting the

¹ *In re Stoneham*, [1919] 1 Ch. 149; 25 Digest 509, 59.

² *Strong v. Bird* (1874), L. R. 18 Eq. 315; 25 Digest 538, 268; *Re Stewart*, [1908] 2 Ch. 251; 25 Digest 539, 274.

³ *Re James*, [1935] 1 Ch. 451; Digest Supp.

⁴ *Re James*, *supra*.

⁵ *Re Innes*, [1910] 1 Ch. 188; 25 Digest 540, 275.

property in the trustees is to transfer it in equity to the cestuis que trust. This is the case even where the trust is not for the general benefit of the cestuis que trust but for some particular purpose, such as their education, when, if there is any surplus after the particular purpose is carried out, it belongs to the cestuis que trust.¹ Wherever this is the case one important result follows. In order that a person to whom a transfer of property is made should take advantage of it, it is not necessary any more in equity than in law that such person should either be a party to the transfer or give any consideration for the property.² Thus if A. privately and unknown to B. conveys by deed Blackacre to B., on B.'s discovering the conveyance he can eject A. from Blackacre.³ In the same way if A. declares himself privately and secretly a trustee of Blackacre in trust for B., B. on learning of the declaration can claim to have Blackacre conveyed to him.⁴ Again, if A. conveys Blackacre to B. as a gift without receiving any consideration whatever for it, or gives B. a horse, completing the gift by delivery, B. immediately becomes entitled to Blackacre or to the horse just as fully (so far as A. is concerned) as if he had in each case given A. the full value of the property.⁵ The same would be the case if A. had declared a trust of Blackacre or of the horse in favour of B.⁶ Hence the rule, as commonly stated, that once a trust is fully constituted it can be enforced against the settlor by any cestui que trust whether he gave or did not give value for the trust. And this rule is absolute unless where the trust cannot be enforced by a cestui que trust at all.⁷

¹ *In re Andrew's Trust*, *Carter v. Andrew*, [1905] 2 Ch. 48; 25 Digest 525, 178.

² *Paul v. Paul* (1882), 20 Ch. D. 742; 25 Digest 210, 447.

³ See *Re McCallum*, [1901] 1 Ch. 143; 35 Digest 36, 296.

⁴ *New, Prance, and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19; 43 Digest 564, 135. A.'s declaration, however, must be present and irrevocable; *Re Cozens*, [1913] 2 Ch. 478; 43 Digest 563, 129.

⁵ *Cochrane v. Moore* (1890), 25 Q. B. D. 57; 25 Digest 508, 47.

⁶ *Kekewich v. Manning* (1852), 1 De G. M. & G. 176; 25 Digest 537, 263.

⁷ See Art. 31. As to assignments of part of debts, see *Forster v. Baker*, [1910] 2 K. B. 636; 8 Digest 428, 68; *Re Steel Wing Co.*, [1921] 1 Ch. 349; 8 Digest 428, 67. Compare *Skipper v. Holloway*, [1910] 2 K. B. 630; 8 Digest 428, 66.

ARTICLE 29.

Incompletely Constituted Trusts.

(1) When a trust has been declared but the settlor has not divested himself in law or equity of the trust property for the benefit of the cestuis que trust, the trust is (as it is said) *in fieri*; that is, no trust is actually constituted, but there is merely an agreement to create a trust.

(2) This agreement cannot be enforced against the settlor unless :

(i) the agreement was based on valuable consideration ; and

(ii) a party to the consideration requires the performance of the agreement.

(3) Parties to the consideration for an agreement to constitute a trust consist of—

(i) parties who gave valuable consideration other than marriage ;

(ii) parties who gave marriage consideration, namely (a) the spouses, (b) the issue of the marriage ;

(iii) trustees as representing any of the above.

Cestuis que trust under the declaration of trust who are not parties to the consideration are called *volunteers*.

(4) Where the court on the demand of a party to the consideration compels the settlor to constitute the trust, it will compel him to constitute the *whole* trust—that is, not only those provisions of it for the benefit of parties to the consideration but those provisions if any for the benefit of volunteers.

(5) For the purposes of this Article the sealing of an agreement does not in itself make the agreement one based on valuable consideration.

(6) This Article is subject to the statutory rules as to voluntary settlements and settlements made in consideration of marriage by a settlor who subsequently becomes bankrupt.

Paragraph (1).

Incompletely constituted trusts are in effect contracts or promises to constitute trusts. The most usual examples of them are undertakings in marriage articles to settle certain sums of money or certain land and covenants in marriage settlements to settle the after-acquired property of the wife—that is, property accruing to her after the marriage.

Paragraphs (2), (3), and (4).

An incompletely constituted trust, being simply a promise or contract to constitute a trust, is subject to the ordinary law of simple contract. If A. promises B. to teach C. law, and neither B. nor C. gives consideration for the promise, neither B. nor C. has any legal remedy against A. should he refuse to perform his promise. If B. gave consideration but C. did not, B. would have a remedy but C. would not. If C. also gave value, both B. and C. would have a remedy.¹ If, instead of promising to teach C., A. had promised to settle £1,000 on him, the result would be in each case precisely the same. This is the primary distinction in law between a conveyance and a simple contract: that a conveyance confers rights on the grantee whether he has given consideration or not, while a contract confers rights on the contractee only if he has given consideration. And this

¹ *Price v. Easton* (1833), 4 B. & Ad. 433; 12 Digest 43, 229.

is the distinction in equity between a completely and an incompletely constituted trust.¹

The chief differences between promises to constitute trusts and other contracts are that the former are almost invariably made in consideration of marriage, that they are primarily intended to confer benefits upon the issue of the marriage not yet born, and that, in the event of there being no issue, benefits are intended to be conferred on persons who are strangers to the whole transaction—a more complicated state of things than is ever found in ordinary contracts not based on marriage consideration.

Thus A. and B. by marriage articles agree that B.'s—the wife's—fortune shall be settled on her for life, then on her husband, and on the death of the survivor on the issue of the marriage, and in default of such issue on C., B.'s daughter by a previous marriage, and if C. should predecease A. and B. and die without issue, then on B.'s sister's children. Now, if in fact no settlement is executed, who is entitled to enforce this agreement?

It is now finally settled that the only persons entitled to do so are A. and B. and the issue of the marriage for whom, as it is said, “the parents purchase.” These are all that are within the marriage consideration.² Formerly it was thought that C. was also,³ but that and a number of other notions of a like kind⁴ are now exploded. Of course, where there are trustees—as where the incompletely constituted trust is a covenant in a settlement to settle after-acquired property—the trustees as representing the parties to the consideration can enforce the agreement too.

Once a party to the consideration applies to the court to enforce the agreement, the court will not enforce it in his favour only. Say, for instance, that in the above

¹ *Re Anstis, Chetwynd v. Morgan* (1886), 31 Ch. D. 596; 40 Digest 528, 731. The difference between trust and contract is well illustrated in *Vandepilte v. Preferred Accident Insurance Corporation of New York*, [1933], A. C. 70; Digest Supp.

² *De Mestre v. West*, [1891] A. C. 264; 25 Digest 239, 661; *A.-G. v. Jacobs-Smith*, [1895] 2 Q. B. 341; 40 Digest 526, 714.

³ *Newstead v. Serles* (1737), 1 A. & G. 264; 25 Digest 238, 656.

⁴ See *Clarke v. Wright* (1861), 6 H. & N. 849; 25 Digest 239, 660.

example, B. dies without making any settlement and A. applies against her executors to have the marriage articles enforced, the court will not order the executors merely to pay A. the income of B.'s fortune for life ; it will order them to settle the fortune in favour of all the beneficiaries under the articles, whether they gave value or are mere volunteers. But the essential point is that only a party to the consideration may enforce the agreement.

It is important to bear in mind, however, that what at first sight may appear to be a mere agreement may be something more and may completely constitute a trust, and in that case the cestui que trust may enforce it even though he is not a party to the consideration. "As a general rule," said Cotton, L.J., in *Gandy v. Gandy*,¹ "a contract cannot be enforced except by a party to the contract. . . . The rule, however, is subject to this exception : if the contract, although in form it is with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as cestui que trust . . . ; then B. would, in a court of equity, be allowed to insist upon and enforce the contract." It might be more in accordance with strict accuracy to say that, in such a case, B. would be entitled to enforce, not the contract, but the trust constituted by the contract. The question is one of construction in each case, and it is necessary to ask whether the agreement or covenant in question was intended to be merely an agreement between the parties which they might vary or release or whether it was intended to confer on others equitable rights capable of being enforced, by the covenantee, as trustee for them, at common law.² In the latter case, the cestuis que trust may enforce the trust which is created. For example, in *Fletcher v. Fletcher*,³ a settlor, who had two illegitimate sons, A. and B., entered into a voluntary covenant with trustees that in case A. and B., or either of them, should survive him, his personal representatives should within twelve months pay £60,000 to the trustees on trust for

¹ (1885) 30 Ch. D. 57, 66 ; 43 Digest 798, 2357.

² Underhill on Trusts, 9th edn., 50.

³ (1844), 4 Hare 67 ; 43 Digest 799, 2364.

A. and B. or such of them as should attain the age of twenty-one. A. survived the settlor, but the trustees refused to sue on the covenant. It was held, nevertheless, that A. could sue to recover payment of the debt out of the assets of the deceased settlor, on the ground that the covenant, although in form a mere agreement between the settlor and the trustees, created a trust in favour of A. In such a case the covenantee becomes, as it were, a trustee of a legal chose in action, that is, the legal right of enforcing the covenant.

Paragraph (5).

At common law a deed—that is, an instrument sealed and delivered by the maker—does not require consideration. In equity it does.¹ Thus a settlement under seal of property which does not belong to the settlor at the time the settlement is made, and which, therefore, conveys nothing at law and can only be enforced in equity, will not be enforced by the court if, in fact, it is not based on valuable consideration.² Where, however, it is based on valuable consideration, such as marriage, then anyone receiving the property when it vests knowing of the trust is bound by it.³ On the other hand, it seems that even when the settlor has covenanted with the trustees to transfer to them the property when and if it vests in him, then, if there is in fact no valuable consideration for the covenant, on its vesting and his refusing to fulfil the covenant no action at common law for damages for breach of covenant lies at the instance of the trustees.⁴

Paragraph (6).

As to this see section 172 of the Law of Property Act, 1925, and section 42 of the Bankruptcy Act, 1914.⁵

¹ *Jeffries v. Jeffries* (1841), Cr. & Ph. 139; 25 Digest 251, 778.

² *In re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; 40 Digest 537, 800.

³ *Pullan v. Koe*, [1913] 1 Ch. 9; 40 Digest 523, 685.

⁴ *In re Pryce*, [1917] 1 Ch. 234; 40 Digest 527, 719.

⁵ 15 Halsbury's Statutes 355; 1 *ibid.* 647.

ARTICLE 30.

Trusts of Imperfect Obligation.

Completely constituted trusts which have not the effect of transferring the equitable interest in the trust property to the cestuis que trust cannot be enforced against the settlor or the trustee. Such trusts may be called *trusts of imperfect obligation*. The most important are :

- (1) Trusts of money voted by Parliament or granted by royal warrant, where the officers charged with executing the trust are responsible only to the Crown.
- (2) Trusts for the payment of creditors to which the creditors are not parties either actually or by being induced by notice of the trust to delay their demands for payment.
- (3) Trusts for the advancement of purposes, public or private, which are not charitable.

Many lawyers deny that a trust exists unless all the cestuis que trust can enforce it. This would exclude from the category of trusts pretty well all incompletely constituted trusts ; at any rate, all those where among the cestuis que trust there are any volunteers. It, of course, excludes altogether trusts such as are dealt with under this Article, and this they recognise by calling these *illusory* trusts. On the whole, it is simpler to regard a trust as completely constituted when the property is vested in trustees, and where none of the cestuis que trust can enforce it to call it, by analogy to contracts of the same kind, a trust of imperfect obligation.

These trusts are altogether different from transactions such as that in *Re Pitt-Rivers, Scott v. Pitt-Rivers*.¹ There a testator who had maintained a museum and pleasure-ground to which he admitted the public, but over which he never gave them any legal rights, devised the same to his son and also an annuity of £300 a year to maintain them. It was shown by evidence that the testator intended, and the son undertook, to keep up the museum and gardens and admit the public as the testator had done, but that the testator had no intention to confer any legal right on the public to admission. It was held that no trust was created. The father obviously intended to rely on the honour of his son. But in the present cases it is intended to impose a legal obligation on the person to whom the trust property is transferred. He is intended to be a trustee in every way, and subject to all the duties of a trustee. The only difference between him and an ordinary trustee is that the law gives the cestuis que trust no mode of enforcing their rights against him.

Paragraph (1).

Thus, votes of funds by Parliament for pensions to former servants² or grants of prize-money by royal charter to be distributed among the persons entitled,³ give no right of action to the persons intended to be benefited.

Paragraph (2).

Trusts for the payment of creditors only bind the settlor in so far as the creditors are parties to or "hold their hands" because of notice of the trusts.⁴ Thus in

¹ [1902] 1 Ch. 403 ; 8 Digest 290, 673.

² *Grenville-Murray v. Earl of Clarendon* (1869), L. R. 9 Eq. 11 ; 43 Digest 615, 567.

³ *Kinloch v. Secretary of State for India* (1880), 15 Ch. D. 1 ; 43 Digest 569, 177.

⁴ *Johns v. James* (1878), 8 Ch. D. 744 ; Stra. L. C. ; 5 Digest 1181, 9542. See also *Re Ellis & Co. v. Cross*, [1915] 2 K. B. 654 ; 5 Digest 1181, 9547.

Re Sanders' Trusts,¹ A. made a trust deed for the benefit of his creditors generally. Information of this deed was conveyed to some creditors, who in consequence took no steps to recover their debts. It was not communicated to others. It was held that the trust was irrevocable as regards the first, but revocable as regards the second class. Where, however, the trust is for the benefit of some only of the settlor's creditors, it may be held that it was intended to benefit them, and so be irrevocable.²

Trusts for the benefit of creditors are now regulated to a large extent by statute. Thus it is provided that an assignment for the benefit of the assignor's creditors generally, or an assignment for the benefit of three or more of the creditors of an insolvent assignor, shall be void unless it is registered with the Board of Trade within seven days after its execution.³ And a trust for the benefit of creditors is also void unless a majority in number and value of the creditors has assented to it before or within twenty-one days after its registration.⁴ Moreover, if an assignment for the benefit of creditors affects land, it must also be registered in the Land Registry.⁵ In consequence of these provisions the rule that a trust in favour of creditors is revocable has lost much of its practical importance.

Paragraph (3).

Trusts not for persons but for purposes not charitable are perfectly legal provided the purpose itself is legal, and that the fund given for the advancement of the purpose is not to be so devoted for a longer time than is permitted by the rule against perpetuities.⁶ Thus trusts

¹ (1878), 47 L. J. Ch. 667 ; 5 Digest 1181, 9544. See also *Garrard v. Lord Lauderdale* (1831), 2 Russ. & M. 451 ; 5 Digest 1180, 9536.

² *New, Prance and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19 ; 5 Digest 1181, 9543.

³ Deeds of Arrangement Act, 1914, sects. 1, 2, 4, as amended by Administration of Justice Act, 1925, sect. 22 ; 1 Halsbury's Statutes 588, 715. And see *Re Halsted, Ex parte Richardson*, [1917] 1 K. B. 695 ; 5 Digest 1073, 8781.

⁴ Deeds of Arrangement Act, 1914, sect. 3 ; 1 Halsbury's Statutes 589.

⁵ Land Charges Act, 1925, sects. 8, 9 ; 15 Halsbury's Statutes 530.

⁶ *Pirbright v. Salway*, [1896] W. N. 86 ; 8 Digest 261, 230.

for the purpose of erecting a monument to the settlor,¹ for the support of dogs or horses,² for the promotion of yachting,³ or for the maintenance of the settlor's tomb in a churchyard,⁴ are quite valid trusts provided they do not tend to perpetuities. In the words of NORTH, J., in *Re Dean, Cooper-Dean v. Stevens*,⁵ such a trust is a perfectly good trust, although it is difficult to see who can ask the court to enforce it. In that case an annuity of £750 was left by a testator to his trustees for the purpose of maintaining his horses. It was held that it was not void, but that the residue left after providing for the maintenance of the horses lapsed.

Trusts of this kind present two practical difficulties: they must not offend the rule against perpetuities and they are difficult to enforce. For these reasons it is usual, when a testator desires to devote property to a purpose which is not charitable and is intended to be more or less permanent—e.g., the maintenance of a tomb—for him to give the property to a charity upon condition that his purpose is carried out, with a gift over to another charity if that condition is not observed.⁶ By this means the perpetuity rule is not infringed, because, as we shall see, gifts to charities are not subject to that rule; and the gift over acts as an inducement to the first charity to observe the testator's wishes.

¹ *Mitford v. Reynolds* (1848), 16 Sim. 105.

² *Re Dean, Cooper-Dean v. Stevens* (1889), 41 Ch. D. 552; 8 Digest 264, 259.

³ *Re Nottage*, [1895] 2 Ch. 649; 8 Digest 265, 266.

⁴ *Pirbright v. Salwey*, *supra*.

⁵ *Supra*, at p. 537.

⁶ *Re Tyler, Tyler v. Tyler*, [1891] 3 Ch. 252; 8 Digest 327, 1100. The gift over must not be to a non-charitable object; *Re Davies, Lloyd v. Cardigan County Council*, [1915] 1 Ch. 543; 8 Digest 318, 989. For an alternative method, see *Re Chardon*, [1928] Ch. 464; Digest Supp.

ARTICLE 31.

Void and Voidable Trusts.

Equity follows the law as to legal assurances, and therefore, where a legal assurance would be liable to fail or to be set aside on the ground that it was (i) made for an unlawful purpose or a purpose contrary to the policy of the law, (ii) intended to delay or defeat creditors within section 172 of the Law of Property Act, 1925,¹ (iii) induced by fraud, coercion, or undue influence, or (iv) void under the Bankruptcy Act, 1914, an assurance by way of trust will also be liable to fail or to be set aside.

It is not proposed here to discuss the question when a trust is void or voidable. A trust is void just where a conveyance would under the same circumstances be void. And when it is void under (i) or (iii) there is a resulting trust to the settlor; when under (ii) to the creditors, and when under (iv) to the trustee in bankruptcy.

It is enough to say that where several trusts arise under the same instrument the fact that one or more of these is void or voidable will not affect the others if these are clearly severable from the void trust. Thus, one of the commonest examples of an unlawful trust is a trust for the illegitimate children which the settlor's mistress has or may have. Now the trust in favour of the unborn children is bad as conducing to immorality. But there is no such objection to the trust in favour of the children already born, and it will be held good.²

¹ 1 Halsbury's Statutes 600. Replacing 13 Eliz. c. 5.

² *Re Harrison, Harrison v. Higson*, [1893] 1 Ch. 561; 44 Digest 815, 6674. See also *Re Porter*, [1925] Ch. 746; 43 Digest 879, 322; *Re Prudential Assurance Company's Trust Deed*, [1934] Ch. 338; Digest Supp.

ARTICLE 32.

What Property may be the Subject-Matter of a Trust.

Any property, except property which is assignable neither at law nor in equity, may be made the subject-matter of an express trust.

Property not assignable at law or in equity consists of—

- (1) Property to which a married woman is entitled for her separate use without power of anticipation.
- (2) Property not assignable by the policy of the law.
- (3) Property expressly rendered unassignable by Act of Parliament.

It has already been noted that all equitable interests are, and always were, assignable, whether the property in which they subsist is or is not assignable at law, except equitable interests vested in married women and subject to a restraint on alienation.¹ But in some cases where the law forbade alienation, equity forbade it too, and it did so by refusing to allow equitable interests to be created in such property. These cases are summed up in paragraphs (2) and (3) of the Article. As an example of property not assignable by the policy of the law, pensions granted for the purpose of keeping an officer fit for further service to the Crown may be given. Properties provided by Parliament for services to the Crown and for the support of honours conferred for such services (such as the Blenheim Estates) are usually made inalienable by the Act settling them.

¹ See Art. 143.

A. PRIVATE TRUSTS (*continued*).

CHAPTER 2.

TRUSTEES : THEIR KINDS, APPOINTMENT, RETIREMENT, AND ESTATE.

SUMMARY.

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ARTICLE 33.

Ordinary and Statutory Trustees.

(1) Trustees are now primarily divisible into *ordinary* and *statutory* trustees.

(2) Ordinary trustees now consist of individual trustees and trust corporations.

(3) Statutory trustees consist of *judicial* trustees appointed under the Judicial Trustees Act, 1896,¹ and the *public* trustee appointed under the Public Trustee Act, 1906.²

¹ 20 Halsbury's Statutes 76.

² 20 Halsbury's Statutes 79.

(4) The public trustee is qualified to act either as an ordinary or a judicial trustee.

Paragraph (1).

Before the Judicial Trustees Act, 1896, all trustees were ordinary trustees. If the court wished to interfere with the administration of a trust it had to do so by taking the administration into its own hands. Until the Judicature Acts, indeed, it was only by an administrative action that the trustees were able to obtain its directions as to how they should proceed in cases of difficulty. Now a mode of obtaining this without administration has been provided.¹ Moreover, as there was formerly no other mode of controlling the action of the trustees, any one interested in the trust property was entitled to claim administration as of right.² That, too, is now altered.

Paragraph (2).

Trust corporations may be regarded as a special kind of ordinary trustees since by recent legislation they enjoy rights and privileges which the individual trustee is denied. What is hereafter said of individual ordinary trustees applies also to them subject to those points of difference. A trust corporation is defined as the Public Trustee or a corporation either appointed by the court in any particular case to be a trustee, or entitled by rules under section 4 (3) of the Public Trustee Act, 1906, to act as custodian trustee; and the definition includes (*inter alia*) the Treasury Solicitor and other officials, a trustee in bankruptcy and, in the case of charitable trusts, certain public bodies.³

¹ See *post*, Art. 61.

² *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; 11 Digest 349, 349.

³ Law of Property Act, 1925, sect. 205 (15 Halsbury's Statutes 389), as extended by Law of Property (Amendment) Act, 1926, sect. 3 (15 Halsbury's Statutes 547).

ARTICLE 34.

Ordinary Trustees : their Appointment.

(1) Trustees are in the first instance almost invariably appointed by the settlor under the instrument constituting the trust, but, where necessary, they may be appointed by the court. Such trustees are called *original* trustees.

(2) Where it is desired to appoint new trustees in substitution for or in succession to original or other trustees, such appointment may be made—

- (i) By the cestuis que trust jointly where all these are *sui juris* and absolutely entitled.
- (ii) By the person (if any) who is by the trust instrument nominated to appoint new trustees ; or
- (iii) If no such person is so nominated, or the person so nominated is unable or unwilling to act, by the persons having statutory power to appoint new trustees where such power is not expressly excluded by the terms of the trust instrument ; or,
- (iv) Where it is found inexpedient, difficult, or impracticable to appoint new trustees otherwise, by the High Court, or where the trustee is a lunatic, by the Court in Lunacy.
- (v) Where the person having the power to appoint new trustees is a lunatic, by the Court in Lunacy.

(3) The persons having statutory power to appoint new trustees are the surviving or continuing trustees or trustee for the time being (including a refusing or retiring trustee, if willing to make the appointment), or the personal representatives of the last surviving trustee.

Subject to the terms of the trust instrument, these persons or the person (if any) nominated by the trust instrument to appoint new trustees are entitled to appoint a new trustee in substitution for or in succession to another trustee only when the latter—

- (i) is dead ; or
- (ii) remains out of the United Kingdom for more than twelve months ; or
- (iii) desires to be discharged from the trust ;
or
- (iv) refuses or is unfit to act, or is incapable of acting in the trust, or is an infant.

A person who has been removed from the trusteeship under a power contained in the trust instrument is treated as though he were dead ; and a corporation which has been so removed is treated as though it desired to be discharged. A corporation which is dissolved is treated as a trustee incapable of acting. Apart from these cases in which a new trustee may be appointed in place of another trustee, there are also cases (discussed in the note) in which additional trustees may be appointed and separate sets of trustees may be appointed for separate parts of the trust property.

(4) The powers conferred upon the High Court may be exercised by the court whenever it con-

siders that it is expedient to do so. It will in general consider it expedient to do so where the circumstances are such as would entitle a person possessing the statutory power to appoint new trustees to exercise that power, or more particularly where an existing trustee has been convicted of felony or is a bankrupt, or a corporation which is in liquidation or has been dissolved.

Paragraph (1).

There is a maxim that "equity never allows a trust to fail for want of a trustee." In other words, if a settlor or testator has manifested a clear intention to create a trust but has omitted to appoint a trustee, or if the sole trustee nominated by him has declined to act, equity will not allow the trust to fail on that account, but will regard as trustee the person in whom the property vests. For example, if the settlement is created *inter vivos* and the sole trustee appointed disclaims the trust the property will revert to the settlor himself or, if he is dead, to his personal representatives, and the settlor, or his personal representatives, must hold the property on the trusts which have been declared with regard to it.¹ Normally, however, original trustees are appointed as indicated in the paragraph.

Paragraph (2).

Where all the cestuis que trust are *sui juris* and absolutely entitled, they are full owners of the trust property in equity and the trustees must obey their directions.²

¹ *Mallott v. Wilson*, [1903] 2 Ch. 494; 43 Digest 708, 1465.

² This does not apply, however, if land, or the proceeds of sale thereof, are held for charitable, ecclesiastical or public purposes, nor does it apply to the trustees of a term of years absolute limited by a settlement on trusts for raising money or to the trustees of a like term created under the statutory remedies relating to annual sums charged on land. See Law of Property Act, 1925, sect. 121; 15 Halsbury's Statutes 300. See *infra*, Art. 67.

Accordingly, if they appoint new trustees the old trustees must convey the trust property to these on their direction.

The statutory powers of appointing new trustees given to individuals depend on sections. 36-39 of the Trustee Act, 1925,¹ the chief provisions of which have been outlined above. It will be noticed that the persons having these statutory powers may appoint a new trustee "in substitution for or in succession to" another trustee in certain specified cases. In those cases there is, in effect, a vacancy in the trusteeship. But section 37 of the Act of 1925 enables the person appointing to do more than fill the vacancy; for it provides that on the appointment of new trustees the number of trustees may, subject to the restrictions imposed by the Act,² be increased. It also provides that on such an appointment, a separate set of trustees, not exceeding four, may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts. On the other hand, subject to an exception to be mentioned below, it is not obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed. This, however, is subject to the provision that (except where only one trustee was originally appointed *and* a sole trustee will be able to give valid receipts) a trustee cannot be discharged from his trust unless there will be either a trust corporation or at least two individuals to perform the trust. The exception is not a wide one; because section 14 of the Act provides that a sole trustee (not being a trust corporation) cannot give a valid receipt for capital money arising under a trust for sale or a settlement of land. The only case, therefore, in which a sole individual trustee can act is where the settled property consists of pure personalty. The general policy of the Act is that, in the case of a trust of land or of the proceeds of sale of land there shall be at least two trustees or a trust corporation.

Before 1926, there was no statutory provision for the

¹ 20 Halsbury's Statutes 129, 134.

² *Post*, p. 105.

appointment of an additional trustee except when a vacancy had occurred in the trusteeship and a new trustee was being appointed to fill the vacancy. Now, however, sub-section 6 of section 36 provides that an additional trustee or additional trustees may be appointed where a sole trustee, other than a trust corporation, is or has been originally appointed, or where there are not more than three trustees, none of them being a trust corporation. The appointment may be made by the person or persons nominated for the purpose of appointing new trustees by the trust instrument, or, if there is no such person, or no such person able and willing to act, then by the trustee or trustees for the time being. This power to appoint additional trustees is not obligatory, unless the trust instrument or some statutory enactment provides to the contrary ; and the power must never be exercised so as to increase the number of trustees beyond four.

In fact, just as the general policy of the Act is to prevent the number of individual trustees of land or of the proceeds of sale of land from falling below two, so also its policy is to prevent their number being greater than four. Under section 34 of the Act if a settlement of land or a disposition on trust for sale of land is made after 1925, the number of trustees appointed must not exceed four and must not be increased beyond four ; and if more than four persons are named as trustees, the four first named (who are able and willing to act) are alone to be the trustees, and the other persons named are not to be trustees unless they are appointed on the occurrence of a vacancy. In the case of such settlements and dispositions made before 1926, if there were more than four trustees they may continue to act ; but the section provides that no new trustee can be appointed until the number is reduced to less than four, and thereafter the number must not be increased beyond four.

The High Court has a wide power, which is exercised by the Chancery Division, of appointing trustees under section 41 of the Trustee Act, 1925,¹ which provides that the court may, whenever it is expedient to appoint a

¹ 20 Halsbury's Statutes 137.

new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. This power may be exercised, for instance, when a trustee is convicted of felony, or is a lunatic or defective, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved. In addition, the court has, as we shall see later, power to appoint trustees under the Judicial Trustees Act, 1896,¹ and under the Public Trustee Act, 1906.²

In the exercise of its statutory powers the court is guided by consideration for the welfare of the beneficiaries.³ And, apart altogether from statutory powers, the court has an inherent jurisdiction to remove trustees and to appoint new trustees to take their places whenever the welfare of the beneficiaries so requires.⁴

Concurrently with the powers of the Chancery Division, the Court in Lunacy has, under section 129 of the Lunacy Act, 1890,⁵ power, where the donee of the power to appoint is lawfully detained as a lunatic, to nominate another person to appoint in his stead, and to make an order vesting the property in the new trustees when appointed.⁶

Where the donee of the power to appoint new trustees is a beneficiary under the trust the power is personal, and remains in him after he has alienated his interest.⁷ He is not, however—any more than the person having the statutory power—under a legal obligation to exercise his power.⁸ If, however, he, or the person having the statutory power, is willing and able to appoint, the court has no jurisdiction to override this power by itself

¹ 20 Halsbury's Statutes 76.

² 20 Halsbury's Statutes 79.

³ See *Re Barker's Trusts* (1875), 1 Ch. D. 43; 43 Digest 757, 2006; *Re Adams' Trusts* (1879), 12 Ch. D. 634; 43 Digest 757, 2007.

⁴ *Re Wrightson, Wrightson v. Cooke*, [1908] 1 Ch. 789; 43 Digest 755, 1976.

⁵ 11 Halsbury's Statutes 68.

⁶ *Re Fuller*, [1900] 2 Ch. 551; 33 Digest 225, 1355.

⁷ *Hardaker v. Moorhouse* (1884), 26 Ch. D. 417; 43 Digest 674, 1047.

⁸ *Re Sarah Knight's Will* (1883), 26 Ch. D. 82; 43 Digest 680, 1106.

appointing.¹ But where it is desirable the court will appoint, as where, for instance, the last trustee has been guilty of a breach of trust,² or where joint donees of the power cannot agree,³ or where there is doubt as to who is entitled to exercise the express or statutory power.⁴ In such cases the existence of an express or statutory power to appoint will not exclude the court's jurisdiction.

Paragraph (3).

A last surviving trustee is not entitled to appoint new trustees by his will.⁵ On his death, as we shall see, the trustee's estate descends to his personal representatives, who are themselves trustees of the property until new trustees are appointed. The personal representatives may, subject to any express power given to other persons by the trust instrument, themselves appoint new trustees.⁶

ARTICLE 35.

Ordinary Trustees : who may be appointed.

(1) Any person including a corporation but excepting an infant is competent to be a trustee of any property which at law or in equity he is competent to hold.

(2) A settlor is entitled to appoint any competent person a trustee, but a person nominated by the trust instrument, or entitled by statute to appoint new trustees should not appoint, as a rule, any person, though competent, whom the court would not appoint.

¹ *Re Higginbottom*, [1892] 2 Ch. 132 ; 43 Digest 681, 1109.

² *Re Pilling's Trusts* (1883), 27 Sol. J. 199 ; 43 Digest 750, 1902.

³ *Re Tempest* (1866), L. R. 1 Ch. 485 ; 43 Digest 687, 1185.

⁴ *Re Woodgate* (1857), 5 W. R. 448 ; 43 Digest 683, 1134.

⁵ *Re Parker's Trusts*, [1894] 1 Ch. 707 ; 43 Digest 681, 1117.

⁶ *In re Ingleby & Co.* (1883), 13 L. R. Ir. 326.

(3) The court will not appoint (1) a person under disability; (2) a person not resident within the jurisdiction of the court, unless the trust property is abroad or all the beneficiaries are abroad; (3) a cestui que trust or the husband or wife or the solicitor of a cestui que trust; (4) or any person who has been guilty of conduct which under the preceding Article would justify his removal from the position of trustee.

(4) A married woman is not a person under disability for the purposes of this Article, and is as competent to be a trustee as a feme sole.

Paragraph (1).

An infant cannot be appointed a trustee. By section 20 of the Law of Property Act, 1925,¹ any such appointment is void. And by section 19 of the same Act² any purported conveyance to an infant of a legal estate will pass no legal estate to him and will operate merely as a declaration of trust; but if it is made to the infant and another person of full age the legal estate will vest in that other person.

Paragraph (2).

Formerly it was generally thought that the donee of a power to appoint new trustees *could* not appoint himself.³ It has now been decided that this is not the law. It is, as a rule, most undesirable that the donee should appoint himself or his solicitor, since the power to appoint is a fiduciary one⁴; but in a proper case the donee, under an express power, is entitled to do so, and the court will

¹ 15 Halsbury's Statutes 198.

² 15 Halsbury's Statutes 197.

³ *In re Sampson, Sampson v. Sampson*, [1906] 1 Ch. 435; 43 Digest 681, 1110.

⁴ *Re Skeat's Settlement* (1889), 42 Ch. D. 522; 43 Digest 678, 1084; *Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297; 43 Digest 678, 1085.

approve the appointment¹; and section 36 of the Trustee Act, 1925,² now provides expressly that a person exercising the statutory power of appointment conferred by that section may appoint himself.

Though the donee (express or statutory) of a power to appoint new trustees may lawfully appoint a person whom the court would not appoint,³ it is very injudicious for him to do so. If it is found necessary for the court afterwards to remove such person, the donee may be made liable for the costs,⁴ and it is submitted that, if the appointment is flagrantly improper and the person appointed commits a breach of trust, the donee may himself be held liable for such breach.⁵

Since the Bodies Corporate (Joint Tenancy) Act, 1899, a corporation may be appointed a co-trustee with an individual.⁶ Now under section 4 of the Public Trustee Act, 1906, a bank or insurance company or other body corporate may be appointed a custodian trustee. And under the Trustee Act, 1925, a trust corporation can be appointed a sole trustee. If the court appoints it, remuneration for its services can be ordered.

Paragraph (4).

Formerly a married woman was not entitled to become a trustee without her husband's consent. This was because she had no common law capacity to hold property independently of her husband, who was, moreover, responsible for her acts as trustee. This was altered by the Married Women's Property Act, 1882. But even after that difficulties might arise as to a married woman's power to convey the trust property without her husband's joining in the conveyance. These difficulties, however, were removed by section 1 of the Married Women's

¹ *Montefiore v. Guedalla*, [1903] 2 Ch. 723; 43 Digest 678, 1086; *In re Cotter*, [1915] 1 Ch. 307; 43 Digest 678, 1089.

² 20 Halsbury's Statutes 129.

³ *In re Cotter*, *supra*.

⁴ *Raikes v. Raikes* (1866), 35 Bead. 403; 43 Digest 674, 1046.

⁵ See *Re Earl of Litchfield* (1737), 1 Atk. 87; 4 Digest 226, 2120.

⁶ *Re Thompson's Settlement*, [1905] 1 Ch. 229; 13 Digest 354, 920.

Property Act, 1907, which is now replaced by section 170 of the Law of Property Act, 1925, under which a married woman trustee can dispose of trust property without the concurrence of her husband and in all respects as if she were a feme sole.

ARTICLE 36.

Ordinary Trustees : Disclaimer of Trust.

(1) Any person, even though he may have agreed before appointment to act as trustee, may after appointment (but not after acting in the trust) disclaim the trust and trust property.

(2) He may disclaim expressly by deed or impliedly by refusing in language or by conduct to act as trustee.

(3) If a person appointed trustee does not disclaim expressly or impliedly within a reasonable time, the court may hold that he has accepted the trust.

(4) A person appointed trustee must disclaim or accept the whole trusts and trust property.

Paragraph (1).

A person who has promised to become trustee may disclaim after the trust is created if he received no consideration for his promise. Where a trustee does disclaim, if he is sole trustee, and the settlor is living, the trust property remains vested in the settlor, who is himself trustee of it for the purposes of the trust until new trustees are appointed.¹ Where the trustee is

¹ *Mallott v. Wilson*, [1903] 2 Ch. 494; 43 Digest 708, 1465.

appointed by will, and by the same will the trust property is devised or bequeathed to the trustee, if the trustee disclaims the trust he takes no interest under the will in the trust property.¹

Paragraph (2).

The usual mode of disclaiming is by deed. But an oral refusal or a refusal by conduct²—such as by purchasing some of the trust property from the person in whom it would vest in case of disclaimer by the trustee³—is equally effective though not equally expedient.

Paragraph (4).

Thus in *Re Lord and Fullerton's Contract*,⁴ a testator declared trusts of real and personal property, some of which was in England and some abroad. One trustee accepted the trust as to the foreign property, and the other as to the English property. On a sale of the English property by the latter it was held that the trustee who accepted as to the foreign property was also a trustee of the English property and must join in the sale.

ARTICLE 37.

Ordinary Trustees : their Retirement.

Once a trustee has accepted the trust he cannot disclaim. He may be removed, however, by the court in exercise of its general jurisdiction over the execution of trusts ; and

¹ *Re Birchall, Birchall v. Birchall* (1889), 40 Ch. D. 436 ; 40 Digest 700, 1381.

² *In re Clout and Frewer's Contract*, [1924] 2 Ch. 230 ; 43 Digest 700, 1382.

³ *Stacey v. Elph* (1832), 1 M. & K. 199 ; 43 Digest 699, 1375.

⁴ [1896] 1 Ch. 228 ; 43 Digest 699, 1365.

he may also obtain a release from his trusteeship :—

- (1) when the powers as to the appointment of new trustees are lawfully exercised ;
- (2) if the trust instrument contains a power enabling him to retire ;
- (3) if all the beneficiaries, being *sui juris*, consent to his retirement ; and
- (4) under the provisions of section 39 of the Trustee Act, 1925.¹

Under its general jurisdiction the court can, at any time during an action for the administration of the trust property, remove a trustee.² It will do this, as a rule, however, only on one of three grounds : (i) want of honesty ; (ii) want of reasonable capacity ; (iii) want of reasonable fidelity. Formerly, a trustee who wished voluntarily to retire could do so only in one of the three events first enumerated above. Now, however, by section 39 of the Trustee Act, 1925,³ a trustee may retire by deed ; but his co-trustees and the person, if any, entitled to appoint new trustees must consent by deed to his retirement, and it is essential that after his discharge there shall be either a trust corporation or at least two individual trustees to perform the trust. This section applies to all trusts, whenever created, but it may be negatived by the trust instrument.

ARTICLE 38.

Ordinary Trustees : Vesting Trust Property.

Upon the appointment of new trustees, or on the retiring of an existing trustee, the trust

¹ 20 Halsbury's Statutes 134.

² *In re Wrightson*, [1908] 1 Ch. 789 ; 43 Digest 755, 1976.

³ 20 Halsbury's Statutes 134.

property must be vested in the new trustees, or in them jointly with any continuing trustees, or in the continuing trustees.

At one time this was effected by an ordinary assurance executed by the former trustees ; but nowadays a more convenient alternative is provided by a vesting declaration contained in the deed of appointment or retirement itself. Section 40 of the Trustee Act, 1925,¹ provides that where a new trustee is appointed by deed and the deed contains a declaration by the appointor to the effect that the trust property shall vest in the persons who by virtue of the deed become or are the trustees, the deed shall operate, without any conveyance or assignment, to vest the trust property in those persons as joint tenants. Conversely, if a trustee retires by deed the trust property may be vested in the continuing trustees by a vesting declaration contained in the deed of retirement and made by the retiring and the continuing trustees and the person, if any, entitled to appoint new trustees. Moreover, if the deed, whether it be a deed of appointment or a deed of retirement, is made after 1925, the deed need not necessarily contain an express vesting declaration, because it is provided that, subject to any express provision to the contrary in the deed, such a declaration shall be implied.

This section, however, does not extend (a) to land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock ; (b) to land held under a lease which contains a covenant against assignment without consent, unless before the execution of the deed the requisite consent has been obtained, or unless by virtue of any statute or rule of law the vesting declaration would not operate as a breach of covenant or give rise to a forfeiture ; (c) to any share, stock, annuity or property which is only transferable in the books of a company or other body, or in manner directed by or under an Act of Parliament.

¹ 20 Halsbury's Statutes 135.

In cases where it is found impossible or difficult to obtain a transfer of the trust property, application may be made to the court, under section 44 of the Act of 1925,¹ for a vesting order.

A vesting *declaration* was introduced for the purpose of facilitating the transfer of the trust property to the new trustees where it was impossible to obtain an assurance of it from the old or retiring trustees, and where it was desirable to avoid the expense of a vesting *order*. Vesting *orders* are still frequently found necessary,² and a vesting order may be made where the trustees in whom the property is to be vested have already been appointed.³

ARTICLE 39.

Ordinary Trustees : Estate Taken.

(1) A trust is said to be a *simple* or *passive* trust when the duties of the trustee are left to be defined by the general law ; it is said to be a *special* or *active* trust when express duties or powers are imposed or conferred upon the trustee by the trust instrument.

(2) Under the law before 1926 where the trust was a simple trust, and the trust property was freehold land, then :

- (i) Where the conveyance of the trust property to the persons appointed trustees was by deed of grant, such persons took no estate in the land unless it was limited in the deed not merely unto them but also to their use ;

¹ 20 Halsbury's Statutes 140.

² See, for instance, *Re General Accident Assurance Corporation, Limited*, [1904] 1 Ch. 147 ; 43 Digest 744, 1824.

³ *In re Kenny's Trusts*, [1906] 1 I. R. 531 ; 43 Digest 739, o.

- (ii) Where the conveyance was by will they took no estate unless the land was so limited or unless from the terms of the will it was clear that the testator intended the land to vest in them.

(3) Where the trust was a special trust, then, though the trust property was freehold land, and though it was not limited to the use of the trustees :

- (i) Where the conveyance was by deed of grant the trustees took an estate in the land of the same extent as the words of the deed would operate to convey to a purchaser for value ;
- (ii) Where the conveyance was by will, the trustees took only an estate *pur autre vie* in the land if such estate was sufficient to enable them to perform the special duties of the trust ; but if such an estate might not be sufficient for such purposes, then they would take the fee simple whether the land was limited by the will to them or to them and their heirs.

(4) Since 1925, all legal estates in land with the exception of estates in fee simple absolute in possession and terms of years absolute are abolished, and on the creation of a trust of lands held in fee simple the legal fee simple vests in the estate owner who, in trusts coming within the Settled Land Act, 1925,¹ is usually the life tenant, and in trusts not coming within that Act the trustees. All the interests taken by the beneficiaries are equitable.

¹ 17 Halsbury's Statutes 833.

Paragraph (2).

The Statute of Uses, 1535, had the effect of transferring the legal estate in land to the person to whose use or in trust for whom it was conveyed. But the operation of the statute was confined to conveyances of freehold lands upon passive uses or trusts. Where the estate conveyed was freehold, and the trust upon which it was conveyed was passive, then the statute imperatively applied, provided the assurance was *inter vivos*. Where, however, it was by will, the statute only applied where it seemed that it was the intention of the testator that it should apply, but the court would assume that it was intended that it should apply where the limitations were expressed as they would be in a deed.¹

Where the trust property assured to the trustees was merely equitable freehold in land, then the statute no more applied—whether the assurance was by will or deed—than it did when the trust property was leasehold or pure personalty.

It is to be remembered that, whether the Statute of Uses operated or not, the cestui que trust could never take a greater estate in the land than that limited to the trustees.²

Paragraph (3).

The rule as to wills stated in the Article is based on sections 30 and 31 of the Wills Act, 1837. An example or two will illustrate the meaning of the Article.

Suppose A. by deed conveyed Blackacre to B. in fee simple in trust to receive the income, and, after discharging all expenses and outgoings, to pay the net income to C. for life, and upon C.'s death to hold Blackacre in trust for D. in fee simple. Now, here the trust in favour of C. is a special trust, and that in favour of D. a simple trust. The existence of the special trust, however, prevented the Statute of Uses from operating, and

¹ See *Doe v. Field* (1831), 2 B. & A. 564 ; 43 Digest 725, 1633. Cf. *Houston v. Hughes* (1827), 6 B. & C. 403 ; 43 Digest 730, 1667 ; *Re Townsend's Contract*, [1895] 1 Ch. 716 ; 43 Digest 733, 1693.

² *In re Oliver's Settlement*, [1905] 1 Ch. 191 ; 40 Digest 636, 1750.

accordingly the whole legal fee vested in B. If, however, the assurance had been by will, then, as an estate for the life of C. would be all B. needed in order to perform the special trust, that is all he would take, and the limitation over to D. would carry both the equitable and the legal estate in Blackacre.¹

On the other hand, if it was not clear on the face of the will that an estate *pur autre vie* would be sufficient to enable the trustee to perform the special trust, he would take the fee simple, whether it was expressly limited to him or not. Thus, if A. by will devised Blackacre to B. in trust for C. for life for her own separate use, and on C.'s death to her children in fee simple, and in default of children in trust for D. for her separate use, and on D.'s death to her children in fee simple, here B. would take the fee simple, because an estate *pur autre vie*, though sufficient to enable him to perform the special trust for C.'s separate use, would not enable him to perform the special trust for D.'s separate use should it ever require performance.² Special trusts which arise in this way from time to time are called *recurring* trusts.

The importance of this rule as to the estate taken by the trustees lay chiefly in this, that the rule in *Shelley's Case*³ applied only if all the limitations were legal or all were equitable. Thus, in the example last given, if there had been no recurring special trust, the trustee would have taken only an estate for C.'s life in Blackacre; C.'s interest would then have been equitable, while the limitation to the heirs of her body would have been legal. Accordingly C. would have taken only an estate for life with the legal contingent remainder for whoever might be the heir of her body. But the recurring special trust, as it vested the legal fee simple in the trustee, made all the limitations to the cestuis que trust equitable. Accordingly C. took not an equitable life estate, but an equitable fee tail, which she could

¹ *Blagrove v. Blagrove* (1849), 4 Ex. 550; 43 Digest 731, 1675.

² *Harton v. Harton* (1798), 7 T. R. 652; 43 Digest 734, 1700; *Van Grutten v. Foxwell*, [1897] A. C. 658; 43 Digest 735, 1704.

³ (1579), 1 Rep. 88a; 44 Digest 922, 7798.

bar and so put an end to the recurring trust in favour of D.¹

Paragraph (4).

Since 1925, the Statute of Uses is repealed.² Settlements of freehold land by way of use, therefore, can no longer be created. Such settlements must be made now by way of trust, that is, all beneficial interests arising under them will be equitable interests. In fact the only estates in land which now are capable of subsisting or of being conveyed or created as legal estates are an estate in fee simple absolute in possession and a term of years absolute.³ All other estates in land must be necessarily equitable; and if it is desired nowadays to create *inter vivos* a trust of a legal estate in land only two methods are possible. One is to vest the land, either for an estate in fee simple or for a term of years absolute in trustees on trust for sale, and to give to the cestuis que trust beneficial interests in the proceeds of sale.⁴ If, however, it is desired to give to the cestuis que trust successive beneficial interests in the land itself two deeds become necessary.⁵ One is a vesting deed which must convey the whole legal estate, whether it be a fee simple or a term of years, to the tenant for life or other person (called the statutory owner⁶) who has for the time being the powers of a tenant for life under the Settled Land Act, 1925.⁷ The other is a trust instrument which declares the trusts on which the land is to be held and gives certain other prescribed particulars.⁸ The result is that the tenant for life or statutory owner under such a settlement occupies a dual position; namely, he is the legal owner of the fee simple or the term of years, as

¹ *Van Grutten v. Foxwell*, *supra*.

² Law of Property Act, 1925, sect. 207, 7th Sched.; 15 Halsbury's Statutes 391, 431.

³ *Ibid.*, sect. 1; 15 Halsbury's Statutes 177.

⁴ *Ibid.*, sects. 2 (1) (ii), 3 (1) (b), 23-33; 15 Halsbury's Statutes 180, 184, 199-211.

⁵ Settled Land Act, 1925, sect. 4 (1); 17 Halsbury's Statutes 840.

⁶ *Ibid.*, sect. 117 (xxvi); 17 Halsbury's Statutes 953.

⁷ *Ibid.*, sect. 4 (1) (2); 17 Halsbury's Statutes 840. As to the contents of the vesting deed, see sect. 5 (1); 17 Halsbury's Statutes 841.

⁸ As to the contents, see sect. 4 (3); 17 Halsbury's Statutes 840.

the case may be, and he is the equitable owner of the beneficial interest marked out for him by the trust instrument. This apparently complicated method of settling property has a distinct advantage in the practice of conveyancing, because it means that the whole legal estate is vested in one person from whom a purchaser can safely take a title, because it is provided¹ that a purchaser of the legal estate need not concern himself with the trust instrument but only with the vesting deed.

If a settlement is created by will the machinery to be employed is similar. A person can by his will create a trust for sale of land just as he can by deed *inter vivos*. But if a testator desires the land itself to be enjoyed by the beneficiaries successively his will alone will not constitute the settlement. The will will operate as a trust instrument,² and his personal representatives must execute, when required to do so, a vesting deed or a vesting assent conveying the legal estate to the tenant for life or statutory owner.³

ARTICLE 40.

Ordinary Trustees : Devolution of Estate.

Trust property is always vested in the trustees, where there are more than one, as joint tenants. Therefore, on the death of one of them the whole of it remains vested in the other or others surviving. On the death of the last surviving, the trust property, whether it is personalty or realty and whether or not the last surviving trustee attempts to devise or bequeath it, devolves upon his personal representatives.

¹ Settled Land Act, 1925, sect. 110 ; 17 Halsbury's Statutes 943.

² *Ibid.*, sect. 6 ; 17 Halsbury's Statutes 842.

³ *Ibid.*, sects. 6, 8 ; 17 Halsbury's Statutes 842, 844.

Formerly the trust estates of a sole trustee devolved on his death precisely as if they were his own absolutely. If he left no heirs they were even, it seems, liable to escheat. This liability was abolished by section 46 of the Trustee Act, 1850. Later, by section 30 of the Conveyancing Act, 1881, they devolved whatever their nature on his personal representatives, provided that they were not legal copyhold. Copyholds devolved on the customary heir unless they were expressly devised.¹ Copyholds, however, were abolished as from 1925; and the rule now is that on the death of a sole or last surviving trustee both his estates and his office vest in his personal representatives. And section 18 of the Trustee Act, 1925,² provides that until the appointment of new trustees the personal representatives are capable of exercising or performing any trust which was given to or capable of being exercised by the deceased.

ARTICLE 41.

Judicial Trustees.

(1) The court, on the application of the settlor, or a trustee or beneficiary, may appoint a judicial trustee as sole trustee, or in addition to or in substitution for any other trustee or trustees.

(2) Such trustee is an officer of the court, and if the court is not satisfied to appoint the person nominated by the party applying for the appointment, it may appoint the official solicitor of the court, the public trustee, or any private person.

(3) The judicial trustee's duties, rights, and liabilities are the same as those of an ordinary trustee, subject to these qualifications:

¹ Copyhold Act, 1894, sect. 88; 3 Halsbury's Statutes 627.

² 20 Halsbury's Statutes 109.

- (i) The court may assign him remuneration ;
- (ii) If he is not the official solicitor or public trustee he must give security ;
- (iii) He must every year submit his accounts for audit by an officer of the court or a professional accountant appointed by the court ;
- (iv) He must obey any direction given by the court as to inquiries to be made into, and as to the mode of conducting, the administration of the trust.

The administration of the Judicial Trustees Act, 1896,¹ is now regulated by the Rules of 1897 made in pursuance of the Act.²

Paragraphs (1) and (2).

The discretion of the court to appoint or refuse to appoint a judicial trustee is absolute, and is in no way limited by any power to appoint new trustees vested in the applicant or anyone else.³ And if the court is dissatisfied with the person nominated by the applicant, its choice is not confined to the official solicitor ; it may, if it thinks fit, appoint a person proposed by the retiring trustee,⁴ or it may appoint the public trustee.⁵

ARTICLE 42.

The Public Trustee.

(1) The public trustee is a corporation sole with an official seal created by the State. The

¹ 20 Halsbury's Statutes 76.

² See *Yearly Supreme Court Practice*.

³ *Re Ratcliffe*, [1898] 2 Ch. 352 ; 43 Digest 1032, 4721.

⁴ *Douglas v. Bolam*, [1900] 2 Ch. 749 ; 43 Digest 1032, 4729.

⁵ Public Trustee Act, 1906, sect. 2 ; 20 Halsbury's Statutes 79.

State holds itself responsible for any loss of trust property committed to him due to his breaches of trust. He is charged especially to act as trustee of small estates, but is competent to act solely or jointly with other trustees as trustee of any estate except (i) business estates, or (ii) insolvent estates, or (iii) estates held upon charitable trusts. He may decline to act as trustee of any estate on any ground except the smallness of the estate, or he may prescribe the terms on which he will act.¹

(2) By "small estates" are meant estates the capital value of which does not exceed £1,000. On the application of any person of small means, interested in such an estate, who, in the public trustee's opinion, would be entitled to an administration order, the public trustee may declare in writing signed and sealed by him that he takes over the administration of the estate, and thereupon it will vest in him as far as vesting orders under the Trustee Act could transfer it; subject to this, that he cannot exercise the right of transferring stock without the consent of the court.²

(3) Where an estate is being administered in any court, and, because of its smallness or for any other reason, it seems expedient to the court that the public trustee should administer it, the court may order this; and the effect of such order will be the same as if the public trustee had made a declaration as described in the preceding paragraph.³

¹ Public Trustee Act, 1906, sects. 1, 2, 7; 20 Halsbury's Statutes 79, 86.

² *Ibid.*, sects. 2, 3; 20 Halsbury's Statutes 79, 81. The value of an estate is estimated, not when the trust arises, but when the Public Trustee decides to take over its administration; see *In re Devereux, Toovey v. Public Trustee*, [1911] 2 Ch. 545; 43 Digest 1035, 4758.

³ *Ibid.*, sect. 3 (5); 20 Halsbury's Statutes 82.

(4) The public trustee may be appointed by the person creating the trust or by the person or court entitled to appoint new trustees, as *custodian* trustee of the trust property along with ordinary trustees. When so appointed the trust property will be transferred to him as if he were sole trustee; he will have custody of the trust securities, the ordinary trustees having right of sufficient access to them; and all payments of trust moneys will be made to and by him, save that he may in his discretion permit the income to be received by the other trustees, and he may act upon statements of fact made by them. After his appointment the other trustees (who are then called the *managing* trustees) will retain all the rights and powers conferred upon them by the trust instrument (including, if that is exercisable by them, the power to appoint new trustees); but he must concur with them in all acts necessary to discharge their office. The managing trustees will alone count in the computation of the number of trustees required by the Trustee Act, 1925. On the application of (i) himself, (ii) any managing trustee, or (iii) any beneficiary, and on proof that it is the general desire of the beneficiaries, or is otherwise expedient, the court may terminate the custodian trusteeship and make such consequential vesting orders as may be necessary or expedient.¹

(5) The public trustee may be appointed in the same way (unless the trust instrument forbids it) as an ordinary trustee, when his powers and duties will be the same as if he were a private person so appointed: Provided, how-

¹ Public Trustee Act, 1906, sect. 4; 20 Halsbury's Statutes 82.

ever, that on his appointment he may be appointed sole trustee, and the other trustees may then retire, even where originally there were two or more trustees appointed. Where the persons entitled to appoint new trustees propose to appoint the public trustee, they should, as far as practicable, give notice of their intention to all beneficiaries in the United Kingdom, who may within twenty-one days apply to the court to forbid his appointment, and the court, if it thinks fit, may forbid it.¹

(6) The public trustee has power (i) to employ agents like ordinary trustees, (ii) to act in legal proceedings by his officers, and (iii) to charge fees for his services as trustee; and any person aggrieved by any act or omission of his in relation to the trust may apply to the court, which may make such order as it thinks just.²

(7) Any beneficiary may obtain an audit of the public trustee's accounts, but not within twelve months after a previous audit; and the entry of the public trustee as owner of stock in the books of a company is no notice to the company of the trust.³

The above Article is a summary of those sections of the Public Trustee Act, 1906, which refer especially to trusts. Others will have to be referred to in connection with the administration of assets.

Rules have been made under the Public Trustee Act, 1906, which deal primarily with the mode in which he

¹ Public Trustee Act, 1906, sect. 5; 20 Halsbury's Statutes 84.

² *Ibid.*, sects. 9, 10, 11; 20 Halsbury's Statutes 87.

³ *Ibid.*, sects. 11, 13; 20 Halsbury's Statutes 87. But the Public Trustee may demand a deposit to cover the expense of audit and may limit the extent of such audit: Public Trustee Rules, 1912; and see *In re Oddy*, [1911] 1 Ch. 532, at p. 537; 34 Digest 1036, 4766. It is open to doubt whether this provision of the Rules is *intra vires*.

is to carry out his duties, and the fees which he is entitled to charge for the services of his office. It is not necessary here to go to any considerable extent into these. It may be noted, however, that prohibition against the public trustee taking over the administration of a trust involving the carrying on of a business is modified to this extent: (a) that he may become a custodian trustee of such a trust where he is of opinion that no risk is involved, and he is not asked to take over securities involving probable liabilities; and (b) that he may be an ordinary trustee of such a trust provided (i) the business is to be carried on for not longer than eighteen months, (ii) with a view of selling or winding up the business, and (iii) he is satisfied he can carry it on without risk.

It may be noted that while the public trustee is made a corporation sole, no express power is given him to hold either realty or personalty. A licence had to be granted to him by the Crown to hold land in order to prevent its forfeiture under the Mortmain and Charitable Uses Act, 1888.¹

The public trustee acts in a judicial capacity in giving his decisions on matters arising in the administration of the trust, and there lies an appeal from such decisions to the court.² He is entitled to apply, without commencing litigation, for the informal advice of a judge specially selected for this purpose. The judge, when so consulted, can, if he thinks proper, hear the persons interested in the trust. And the public trustee may be appointed sole trustee under a settlement, even though the trust instrument contains a clause directing that the minimum number of trustees under it shall never be less than two or three. Such appointment may be made by the court or by the retiring trustees.³ The public trustee's consent to act as trustee may be given after his appointment even when such appointment is made *inter vivos*⁴; and though the public trustee can

¹ 20 Halsbury's Statutes 385.

² *In re Oddy*, [1911] 1 Ch. 532; 43 Digest 1036, 4766.

³ *In re Leslie's Hassop Estates*, [1911] 1 Ch. 611; 43 Digest 1034, 4743; *In re Moxon*, [1916] 2 Ch. 595; 43 Digest 1034, 4745.

⁴ *In re Shaw* (1914), 110 L. T. 924; 43 Digest 1033, 4733.

act as custodian trustee in a charitable trust, he cannot act as trustee where he would have to exercise a power of selection as to the objects of the trust.¹ And though he cannot accept the trusteeship of a foreign settlement even when the trust property is all in England,² he can accept the trusteeship of an English settlement even though the trust property includes foreign land.³

If, however, only a custodian trustee is desired, it is not necessary, in order to obtain the advantages of the Act, that the Public Trustee should be appointed; because it is provided that certain companies incorporated in the United Kingdom and having there their place of business may act as custodian trustees under the Act.⁴ It has been decided that such a company may be appointed custodian trustee even though the trust is charitable.⁵

¹ *In re Hampton* (1918), 63 Sol. Jo. 68; 43 Digest 1035, 4756.

² *In re Hewitt's Settlement*, [1915] 1 Ch. 228; 43 Digest 1035, 4757.

³ *In re Ardagh's Estate*, [1914] 1 I. R. 5.

⁴ Public Trustee Act, 1906, sect. 4; 20 Halsbury's Statutes 82; Public Trustee (Custodian Trustee) Rules, 1926.

⁵ *Re Cherry's Trusts, Robinson v. Trustees of Wesleyan Methodist Chapel Purposes*, [1914] 1 Ch. 83; 43 Digest 1033, 4735. Such a company, however, can charge only for its services as custodian trustee. If, therefore, it is appointed to be both managing trustee and custodian trustee remuneration cannot be claimed: *Forster v. Williams Deacons Bank, Limited*, [1935] 1 Ch. 358; Digest Supp.

A. PRIVATE TRUSTS (*continued*).

CHAPTER 3.

TRUSTEES: THEIR DUTIES,
POWERS, AND PRIVILEGES.

SUMMARY.

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ARTICLE 43.

Nature of a Trustee's Duties, Powers, and Privileges.

(1) A *duty* of a trustee is an obligation the failure to fulfil which will expose the trustee to legal liability for breach of trust.

A *privilege* of a trustee is a right which the trustee may exercise or not exercise without being exposed to legal liability.

(2) A trustee's duties are either *imperative* or *discretionary*.

A duty is imperative where it imposes an obligation to do or to refrain from doing a certain thing. In this case the failure of the trustee to do that thing or to refrain from doing it, as the case may be, whether he acted honestly or dishonestly or with or without reasonable care and skill, is a breach of trust.

A duty to do is called a *positive*, a duty to refrain from doing a *negative*, duty.

A duty is discretionary where it imposes an obligation on the trustee to use judgment in deciding to do or refrain from doing a certain thing. In this case the failure to do or refrain from doing the thing is not, but the failure to act honestly or to exercise reasonable care and skill in deciding whether to do or refrain from doing the thing is, a breach of trust.

Where an imperative duty is not accompanied by a discretionary duty, it is usually called an *absolute duty* or *trust*; where a discretionary duty is not accompanied by an imperative duty, it is usually called an *absolute power* or *discretion*; where an imperative and a discretionary duty accompany one another, the two are commonly called *a duty coupled with a discretion*, or *a discretion coupled with a duty*.

(3) All the duties and powers vested in the original trustees by the trust instrument, on the death of one or two or more trustees, survive to the other or others surviving, and on the appointment of new trustees vest in such new trustees, unless it appears from the trust instrument that the settlor intended the duties and powers to be personal to the original trustees. On the death of a sole or last surviving trustee the duties and powers imposed or conferred by the trust instrument now vest in the personal representatives of such trustee until new trustees are appointed.

Paragraphs (1) and (2).

What are usually called duties and what are usually called powers or discretions are both in their essence absolute duties. The difference between them does not lie in the nature of the obligation on the trustee, but in the nature of the act he is obliged to do. In the case of duties he is bound to do the thing prescribed, whether in his judgment it is wise to do it or not. In the case of powers or discretions he is bound to exercise his judgment as to whether it is wise to do a thing or not, and act accordingly. Thus, if £10,000 be vested in A. upon trust to receive the income until B. attains twenty-one years of age, and until then to pay the whole or such portion thereof as he may think proper for the maintenance and

education of B., and on B.'s attaining twenty-one to hand over to him the trust fund and all accumulations, A. is under two absolute duties, and has one power or discretion. His absolute duties are to receive the income and to pay over the corpus of the trust fund and the accumulations to B. These duties he must perform whether he thinks the settlor was wise in making such provision for B. or not. His discretion is as to the amount which is to be devoted to the maintenance and education of B. during his minority. Here his duty is to decide how much of the income, if any, may, in his judgment, be wisely devoted to this object. He has no right to hand over the whole or any part of the income without considering whether the money is wisely spent or not, any more than a jury have a right to decide by lot what their verdict shall be.¹

But all powers are also absolute discretions as far as they are discretions at all. Provided the trustee exercises his judgment properly, and executes the power accordingly, the court will not interfere with his exercise of it. The difference between what is called an absolute power and a power coupled with a duty is this: Where the power is absolute, if the trustee in the exercise of his judgment refuses to execute the power at all, the court will not compel him to execute it, unless his refusal amounts to wilful default.² Where the power is coupled with a duty, the court will compel him to perform the duty, and any refusal to perform the duty will be regarded as a repudiation of the power coupled with it. If, however, he is willing to perform the duty, the court will not interfere with his decision as to how the power coupled with it is to be executed.³

Moreover, where a power is coupled with a duty and there are several trustees who cannot agree to the exercise of the power, then the duty prevails. Thus where trustees were directed to sell and given power to postpone

¹ *Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324; 43 Digest 878, 3218; and see *Wilson v. Turner* (1883), 22 Ch. D. 521; 28 Digest 229, 862.

² *Rawsthorne v. Rowley* (1907), 24 T. L. R. 51; 43 Digest 931, 3690.

³ *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571; 43 Digest 880, 3232.

sale, and all the trustees could not agree to postpone sale, the duty to sell at once became absolute.¹

In *Re Bryant, Bryant v. Hickley*,² a testator directed his trustees that after the death or remarriage of his wife they should apply the whole or such part as they thought fit of the income of the expectant share of any child towards the maintenance of such child. The wife remarried, and the trustees in the exercise of their discretion refused to allow her any part of the children's income for their maintenance. It was held that the discretion of the trustees was absolute, and not coupled with any duty, and that the court could not interfere with their bonâ fide exercise of it.

Again, in *Re Hargreaves, Hick v. Hargreaves*,³ trustees were directed at their discretion to sell the trust railway stock and reinvest the proceeds. The trustees applied to the court for directions as to when they should sell such stock, and the court, being of opinion that though the trustees were bound to sell the stock sooner or later yet they had an absolute discretion as to *when* they should sell, held that it could not interfere with the bonâ fide exercise of such discretion. Here the power was coupled with a duty which the trustees were bound and willing to perform, but, so far as they had a discretion as to the mode or time of its performance, the discretion was absolute.

Powers coupled with the duty of managing the trust property are usually regarded as merely incidental to and part of the general scheme of management. When, therefore, the court undertakes the administration of the trusts, it exercises itself such powers. Thus, in *Tempest v. Lord Camoys*,⁴ a settlor devised to S. and F. his real estate upon trust to accumulate the rents and apply them for the benefit of certain persons, of whom F. was one. He empowered his trustees to let his mansion-house. In an

¹ *In re Hilton*, [1909] 2 Ch. 548 ; 43 Digest 936, 3743. This, however, is not the case if the trust is charitable ; *infra*, p. 230.

² *Supra*. See also *In re Charteris*, [1917] 2 Ch. 379 ; 43 Digest 867, 3127.

³ [1901] 2 Ch. 547, *note*. But cf. *In re D'Epinoix's Settlement*, [1914] 1 Ch. 890 ; 43 Digest 941, 3780.

⁴ (1882), 21 Ch. D. 576, *note* ; 43 Digest 880, 3232.

administration suit the chief clerk upon inquiry directed, found that the house should be let. F. objected. It was held that the power to let was incidental to the scheme of management, and could be exercised by the court without F.'s consent.¹

It is to be remembered that the refusal of a trustee to exercise a discretion through an improper though not dishonest motive—such as personal dislike of the beneficiary—is a breach of the duty to use his judgment and therefore a breach of trust which will entitle the court to exercise the discretion itself.² And when the trust instrument gives the beneficiary certain rights, the trustees cannot be given a discretion to decide what is the extent of those rights; that is a matter for the decision of the court.³

Besides those expressly given by the trust instrument or by statute many powers are implied. Indeed, as we shall see, most of the duties of trustees must in the nature of things imply a certain discretion: *e.g.*, a trust to invest in any security in which trust funds may by law be invested gives the trustee a discretion as to choosing the particular security.

As powers and discretions of trustees are duties, all that is hereinafter said as to duties and the mode in which they should be executed and observed applies equally to them; and further, being duties, they cannot—as powers for the donee's own benefit may—be released by the trustee, nor extended or altered in their operation with the consent of a cestui que trust who is not absolutely entitled.⁴

Whether a trustee has in any given instance employed reasonable care, prudence, and intelligence in coming to a decision is purely a question of fact.⁵ To cite authorities,

¹ And see *Re Courtier, Coles v. Courtier* (1887), 34 Ch. D. 136; 43 Digest 378, 3216; cf. *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571; 43 Digest 880, 3232; *Re Hill, Hill v. Pilcher*, [1896] 1 Ch. 962; 43 Digest 906, 3431.

² *Klug v. Klug*, [1918] 2 Ch. 67; 43 Digest 875, 3196.

³ *In re Raven*, [1915] 1 Ch. 673; 44 Digest 641, 4781.

⁴ *Weller v. Ker* (1866), L. R. 1 H. L. (Sc.) 11; 44 Digest 341, 6947.

⁵ *Re De Pothonier, Dent v. De Pothonier*, [1900] 2 Ch. 529; 43 Digest 857, 3042.

as is often done, to show what amounts to reasonable care, prudence, or intelligence, is, it is submitted, a misleading and dangerous practice. It is an attempt to decide a point of fact, not by evidence, but by authority.

If examples are wanted of what has been held in specific cases to prove want of reasonable care, prudence or intelligence, a number will be found below in the notes to Article 69. Further examples, and what is more valuable, a discussion of the matters which the court should take into consideration in deciding what amounts to negligence, will be found in *In re Mackay, Griessemann v. Carr*¹; and *Eaton v. Buchanan*.²

It is to be remembered that as far as absolute duties are concerned, the question of negligence does not arise. The trustee there is bound to do or refrain from doing a definite thing, and if in fact he fails to do or refrain from doing this he is guilty of a breach of trust, whether his failure arose from want of reasonable care, prudence, or intelligence or not. Where a discretion has to be exercised, on the other hand, the courts hold that the trustee must display reasonable care, prudence, and intelligence in coming to a decision, or he has not performed his duty, i.e., has not exercised his discretion at all.

Paragraph (3).

This paragraph expresses the effect of section 18 of the Trustee Act, 1925,³ which takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation.

In order to prevent express duties and powers surviving to surviving trustees or being exercisable by new trustees, the intention of the settlor that they should be personal to the original trustees must be made very clear. Thus, in *Re Smith, Eastick v. Smith*,⁴ a testator appointed his wife M., together with C. and R., trustees of his will.

¹ [1911] 1 Ch. 300; 43 Digest 994, 4361.

² [1911] A. C. 253; 43 Digest 957, 3969.

³ 20 Halsbury's Statutes 109.

⁴ [1904] 1 Ch. 139; 43 Digest 874, 3188.

He gave to "his trustees" all his estate in trust for his wife for life, with power to "the said trustees" at their discretion to sell all or any part of it. It was held that the powers devolved on new trustees.

The trust estates vested in a sole trustee, whatever their nature and whether he attempts to devise them or not, now devolve on his death on his personal representatives. Such personal representatives take them subject to the trust, but formerly they took the powers of trustees duly appointed under the trust instrument only if the terms of the trust instrument showed that the settlor intended them to have them.¹ Now, however, until new trustees are appointed, the personal representatives of the sole or last surviving trustee are entitled to exercise all the powers which could have been exercised by the sole or last surviving trustee, unless a direction to the contrary is contained in the trust instrument. So far as executors are concerned, "personal representatives" include only executors who prove the will.²

ARTICLE 44.

Positive and Negative Duties of a Trustee.

(1) It is an absolute duty of a trustee to carry out the directions of the settlor expressed in the trust instrument as to the trust property so far as such directions can be lawfully carried out.

(2) Subject to this, the trustee's positive duties under the general law of trusts are—

(i) To preserve the trust property ;

¹ *In re Crunden and Meux's Contract*, [1909] 1 Ch. 690 ; 43 Digest 873, 3177.

² Trustee Act, 1925, sect. 18 ; 20 Halsbury's Statutes 109 ; re-enacting Conveyancing Act, 1911, sect. 8.

- (ii) To transfer the income and corpus to the persons entitled thereto ;
- (iii) To give information to the cestui que trust as to the trust property.

The trustee's negative duties are :

- (i) Not to make profit out of the trust property ;
- (ii) Not, as a general rule, to purchase the trust property from his co-trustees ;
- (iii) Not, as a general rule, to delegate his duties.

This statement of the positive duties of a trustee is adopted from the judgment of LINDLEY, L.J., in *Low v. Bouverie*¹ : " The duty of a trustee is properly to preserve the trust fund, to pay the income and the corpus to those who are entitled to them respectively, and to give all his cestuis que trust, on demand, information with respect to the mode in which the trust fund has been dealt with and where it is."

The negative duties stated above might perhaps be described as the modes in which the positive duties are to be performed, but it seems simpler and more in accordance with usage to treat them as negative duties, which in fact they are.

ARTICLE 45.

First Positive Duty : Preserving the Trust Property.

Unless the trust instrument otherwise directs, or unless it gives the trustee a power in the exercise of which he otherwise decides, it is, in order to preserve the trust property, his duty

¹ [1891] 3 Ch. 82 ; 43 Digest 852, 3002.

where, and as soon after his acceptance of the trust as, it is reasonably possible so to do :

- (1) To obtain a transfer of all the trust funds uninvested or invested in negotiable securities into his own hands solely or into the hands of himself and his co-trustees jointly, and a transfer of all the securities for trust funds into his own name solely or into the names of himself and his co-trustees jointly, as the case may be.
- (2) To sell, unless a contrary intention appears in the trust instrument, all wasting or reversionary personalty or unauthorised securities, where successive interests in the same are given to different cestuis que trust, and the trust instrument assuring such personalty to the trustees is a will, and the gift is by way of residue.
- (3) And to invest the proceeds of trust property sold and called in, and the trust funds in his hands, in securities in which by law trust funds may be invested.
- (4) When the trust property is invested in securities in which by law trust funds may be invested, the trustee has a power, unless the trust instrument otherwise directs, to vary such investments from time to time when in his judgment alteration in the investments is for the benefit of the trust property.

All the duties stated in this Article are coupled with an implied discretion. The trustee is bound to perform

them only "where, and as soon after his acceptance of the trust as, it is reasonably possible" to perform them.

Thus, in order to obtain a transfer of the trust property it may be necessary to take legal proceedings. If in the judgment of the trustee such proceedings would be futile, he is under no obligation to take them.¹ Again, as to selling securities, he may, in the exercise of his discretion, decide not to sell immediately if he reasonably thinks there is likely to be a rise in price.² Similar considerations apply to the selling of wasting and reversionary securities, and, in the nature of things, a trustee who is bound to invest in some of many securities must have a discretion as to which he should select.³

Paragraph (1).

A trustee is not justified in leaving money belonging to the trust, or bonds payable to bearer or negotiable instruments in the sole control of a co-trustee, and still less, of course, in the control of retired trustees or agents.⁴ And, as regards securities to bearer retained or taken as an investment by a trustee, it is provided by statute⁵ that the trustee, unless a trust corporation, must, until they are sold, deposit them for safe custody and collection of income with a bank. But title deeds or securities not payable to bearer are different. Thus, in *Re Sisson's Settlement*, *Jones v. Trappes*,⁶ a trustee had for some years sole custody of the title-deeds to the trust property. There was no suggestion of dishonesty against him, or of any improper dealing with the deeds. Another trustee applied to the court to compel him to deposit the deeds in a box accessible only to the trustees jointly. It was

¹ *Re Brogden* (1888), 38 Ch. D. 546; 43 Digest 853, 3011.

² *Marsden v. Kent* (1877), 5 Ch. D. 598; 23 Digest 325, 3916.

³ See Trustee Act, 1925, sect. 3; 20 Halsbury's Statutes 99.

⁴ *Wynne v. Tempest*, [1897] W. N. 43; 43 Digest 995, 4367; *Wyman v. Paterson*, [1900] A. C. 271; 43 Digest 885, 3279; *Mathewson v. Brise* (1843), 6 Beav. 239; 43 Digest 883, 3258; *Field v. Field*, [1894] 1 Ch. 425; 43 Digest 853, 3003.

⁵ Trustee Act, 1925, sect. 7 (1); 20 Halsbury's Statutes 101.

⁶ [1903] 1 Ch. 262; 40 Digest 703, 2376.

held that there were no special circumstances to justify such an order. But trustees now may avoid the possibility of disputes of this kind by taking advantage of a very useful power extended to them by the Trustee Act, 1925,¹ which provides that trustees may deposit any documents held by them relating to the trust, or to the trust property, with any banker or banking company or any other company whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of such deposit shall be paid out of the income of the trust property.

Getting in trust property includes getting satisfaction from former trustees for breaches of trust committed by them and causing loss to the trust property. But a new trustee is entitled to assume without inquiry that the former trustees discharged their duty properly, and it is only when he has notice of the breach that any duty to take proceedings arises.²

It is also provided by the Trustee Act, 1925,³ that where trust property includes any share or interest in property not vested in the trustees, or the proceeds of the sale of any such property, or any other thing in action, the trustees on the same falling into possession, or becoming payable or transferable, may (a) agree or ascertain the amount or value thereof or any part thereof in such manner as they may think fit; (b) accept in or towards satisfaction thereof any authorised investments; (c) allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable; (d) execute any release; without being responsible in any such case for any loss occasioned by any act or thing so done by them in good faith. It is also provided⁴ that trustees shall not be under any obligation to place any *distringas* notice or apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action is derived, payable or charged; nor are they under any

¹ Section 21; 20 Halsbury's Statutes 112.

² *Ex parte Greaves* (1856), 8 De G. M. & G. 291; 43 Digest 937, 3757.

³ Section 22; 20 Halsbury's Statutes 112.

⁴ *Ibid.*

obligation to take any proceedings on account of any act, default or neglect of any persons in whom such securities or other property are or have been vested ; unless, in either case, they are required in writing so to do by a beneficiary or the guardian of a beneficiary, and unless also satisfactory provision is made for the costs of any proceedings required to be taken. These provisions, however, do not relieve the trustees of their paramount duty of getting in the trust property when it falls into possession¹ ; their purpose is merely to define some of the discretions which the trustees may exercise in the discharge of that duty.

Paragraph (2).

This rule as to the duty to sell wasting, reversionary or unauthorised securities is called the rule in *Howe v. Lord Dartmouth*.² It applies only where the property is personalty and is given to the trustees by will by way of residuary bequest. "So far as I am aware, the rule in *Howe v. Earl of Dartmouth* has never been applied except to a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession. The court assumes an intention that the legatees should enjoy the same thing in succession, and, as the only mode of giving effect to such intention, it directs the conversion into permanent authorised investments of all such parts of the residuary estate as are of a wasting or reversionary or unauthorised character. But the rule does not apply to any bequest which is specific as distinguished from residuary."³

It is to be remembered that the rule has no reference to express directions contained in the trust instrument, whether deed or will. Such directions must be obeyed. For example, the rule does not apply if the testator

¹ Section 22 : 20 Halsbury's Statutes 112.

² (1802), 7 Ves. 137 ; 43 Digest 869, 3142.

³ *Per* COZENS-HARDY, J., in *Re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779, at p. 782 ; 40 Digest 523, 683.

expressly authorises the retention of the unauthorised investments,¹ or if he states that the trustees are to sell as and when they shall deem expedient.² Nor does the rule apply if an intention that the wasting securities should be held *in specie* appears in the trust instrument. This intention need not be expressly stated : it may be gathered from the instrument generally. Thus, where the only land the testator possessed was leasehold, a gift of the "rents and profits" of his property to the life tenant was held to be a sufficient indication that he did not intend that the leasehold should be converted.³ In the same way a gift over of the property *in specie* after the life tenant's death is also a sufficient indication that the life tenant is intended to enjoy it *in specie*.⁴

It happens frequently that a delay occurs in converting residuary personalty ; and in such a case it may become necessary, in order to ensure impartiality between the successive beneficiaries, to make adjustments of their rights until conversion. For the purpose of such adjustments the courts of equity have evolved certain rules which are corollaries to the rule in *Howe v. Lord Dartmouth* and may be stated as follows :

(1) If the will directs, expressly or impliedly, that the tenant for life shall receive the actual income of the property he will be entitled to the actual income.⁵ This will be the case, for instance, if the property retained consists of authorised securities, because in that case such a direction will be implied. Such a direction will also be implied if the will contains no express direction to convert⁶ ; and the same result will follow even in

¹ *Brown v. Gellatly* (1867), L. R. 2 Ch. App. 751 ; 43 Digest 619, 596.

² *Re Pitcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199 ; 44 Digest 208, 368 ; cf. *In re Hilton*, [1909] 2 Ch. 548 ; 43 Digest 936, 3743.

³ *In re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312 ; 44 Digest 205, 345 ; *In re Barratt*, [1925] Ch. 550 ; 44 Digest 204, 336. See also *In re Moses, Moses v. Valentine*, [1908] 2 Ch. 235 ; 44 Digest 200, 298.

⁴ *In re Wareham, supra*.

⁵ *Re Chancellor, Chancellor v. Brown* (1884), 26 Ch. D. 42 ; 44 Digest 210, 376.

⁶ *Re Nicholson*, [1909] 2 Ch. 111 ; 44 Digest 206, 355.

the case of an express trust to convert if it is accompanied by a distinct and independent power to retain.¹

(2) If, however, the property retained consists of unauthorised investments, which ought therefore to be converted either under the rule in *Howe v. Lord Dartmouth*² or under an express direction to convert contained in the will, equity, on the principle that it "looks on that as done which ought to be done," endeavours to place the beneficiaries, as far as practicable, in the position they would have been in if conversion had actually taken place. The property, therefore, is valued and on its value the tenant for life is entitled to receive interest at the rate of 4 per cent., any balance of income being treated as capital and the tenant for life receiving the income produced by it.³ If there is an express direction to sell, the property is valued as at the date of the testator's death; if there is no such express direction but the property ought to be converted under the rule in *Howe v. Lord Dartmouth*,⁴ the value is taken at the end of one year from the testator's death.⁵

(3) But these rules do not apply if the property retained consists of leaseholds. It is provided by the Law of Property Act, 1926,⁶ that, subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, when land is held on trust for sale the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings, shall be applied in like manner as the income of investments representing the purchase money would be applicable if a sale had been made and the proceeds had been duly invested. Moreover, the same Act⁷ defines "land" as including "land of any

¹ *Re Chaytor*, [1905] 1 Ch. 233; 43 Digest 618, 586; *Re Inman*, [1915] 1 Ch. 187; 44 Digest 209, 373.

² *Supra*, p. 136.

³ *Re Woods*, [1904] 2 Ch. 4; 40 Digest 656, 1951.

⁴ *Supra*, p. 136.

⁵ *Meyer v. Simonsen* (1852), De G. & Sm. 596; 43 Digest 619, 594; *Brown v. Gellatly*, *supra*, p. 140.

⁶ Section 28 (2); 15 Halsbury's Statutes 204.

⁷ Section 205 (1) (ix); 20 Halsbury's Statutes 385.

tenure." It was held,¹ therefore, that the tenant for life is entitled to the whole of the income of leaseholds pending conversion. The result is that leaseholds are in a peculiar position. They are still subject, presumably, to the rule in *Howe v. Lord Dartmouth*² but not to the corollaries to that rule given above. But the same, it appears, is not true of other forms of personalty; they still remain liable to the rule and to the corollaries as well.³

(4) Where the property is of a future or reversionary character, such as a mortgage debt with arrears of interest or money payable under a policy of life insurance, the tenant for life must wait until the property is actually realised or falls into possession. Then he is entitled to have the amount which is received apportioned between capital and income; and the apportionment is made by ascertaining the sum which, if put out at 4 per cent. compound interest at the date of the testator's death, and accumulated with yearly rests, would have produced, with accumulations and after deduction of income tax, the amount actually received. That sum is treated as capital and retained by the trustees, and the residue represents capital to which the tenant for life is entitled.⁴

It must be noted that these rules as to apportionment have no application to realty, even though the realty be subject to an express direction to convert. But a tenant for life of realty is entitled to the net income of it, no more and no less, until a sale actually takes place.⁵

Paragraph (3).

With regard to the securities in which a trustee may invest, section 1 of the Trustee Act, 1925,⁶ provides a wide

¹ *Re Brooker*, [1926] W. N. 93. In this case there was an express trust for sale, but the principle seems to cover trusts for sale which are implied under *Howe v. Lord Dartmouth*, *supra*, p. 136.

² *Supra*, p. 136.

³ *Re Trollope's Will Trusts*, [1927] 1 Ch. 596; 44 Digest 200, 296.

⁴ *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643; 20 Digest 368, 1065.

⁵ *Re Oliver*, [1908] 2 Ch. 74; 40 Digest 671, 2079; *Yates v. Yates* (1860), 28 Beav. 637; 40 Digest 670, 2070.

⁶ 20 Halsbury's Statutes 94.

range of investments in which a trustee, unless expressly forbidden by the trust instrument,¹ may invest any trust funds in his hands, whether or not those funds are already in a state of investment at the time.

The chief of these are parliamentary stocks or public funds or Government securities of the United Kingdom² ; real securities in the United Kingdom ; the stock of the Bank of England or the Bank of Ireland ; India Seven, Five and a half, Four and a half, Three and a half, Three and Two and a half per cent. stock, or any future issues of such stock ; securities the interest of which is guaranteed by Parliament ; Metropolitan stock or London County Council stock ; the debenture or rent-charge or guaranteed or preference stock of any railway company in the United Kingdom, incorporated by special Act of Parliament, and having during the last ten years past paid a dividend of not less than 3 per cent. per annum on its ordinary stock, or stock of a railway or canal company leased for not less than two hundred years to such a company ; debenture stock of any company owning or operating a railway in India, the interest in sterling on which is guaranteed by the Secretary of State for India ; the annuities of certain Indian railways ; the debenture or guaranteed or preference stock of any company in the United Kingdom established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the last ten years paid a dividend of not less than 5 per cent. on its ordinary stock ; any county council nominal or inscribed stock or the nominal or inscribed stock of the corporation of a borough having at the last census a population exceeding 50,000 ; nominal or inscribed stock of any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having at the last census a population exceeding 50,000, provided that during each of the last ten years the rates levied have not exceeded 80 per cent. of the amount authorised

¹ *In re Burke, Burke v. Burke*, [1908] 2 Ch. 248 ; 43 Digest 933, 3710.

² Great Britain and Northern Ireland : Trustee Act, 1925, sect. 68 (20) ; 20 Halsbury's Statutes 161.

by law to be levied ; any of the stocks, funds, or securities for the time being authorised for the investment of cash under the Colonial Stock Act, 1900¹ ; local housing bonds ; any stock or securities issued in respect of any loan raised by the Government of Northern Ireland ; and any stocks, funds or securities for the time being authorised for the investment of cash under the control or subject to the order of the court.

Trustees may purchase any of the above securities, notwithstanding that they may be redeemable and that the price exceeds the redemption value ; but with regard to certain of those securities, they must not be purchased at a price exceeding 15 per cent. above their redemption value and, if they are liable to be redeemed within fifteen years of the date of purchase, they must not be purchased at a price exceeding the redemption value itself.²

The power of a trustee to invest in real securities does not include a power to purchase land.³ Such a power must be given expressly by the trust instrument itself. The expression " real securities " means, primarily, first legal mortgages of freehold property. It does not include second mortgages.⁴ Nor, as a rule, does it include mortgages of leaseholds⁵ ; but to this rule there is a statutory exception, and trustees having power to invest in real securities have, and are deemed always to have had, power to invest on mortgage of property held for an unexpired term of not less than two hundred years and not subject to any rent greater than one shilling a year or to any right of redemption or to any condition of re-entry except for non-payment of rent.⁶ They may also, when lending money on mortgage, contract that the

¹ 5 Halsbury's Statutes 207.

² Trustee Act, 1925, sect. 2 ; 20 Halsbury's Statutes 94.

³ *Re Morden*, [1905] 1 Ch. 515 ; 43 Digest 939, 3772 ; *Re Wragg*, [1919] 2 Ch. 58 ; 43 Digest 928, 3662. But under sect. 28 (1) of the Law of Property Act, 1925 (15 Halsbury's Statutes 203), trustees for sale of land may purchase other land with the proceeds of sale.

⁴ *Chapman v. Browne*, [1902] 1 Ch. 785, at p. 700 ; 44 Digest 1236, 10685.

⁵ *Re Chennell* (1877), 8 Ch. D. 492 ; 43 Digest 835, 2808.

⁶ Trustee Act, 1925, sect. 5 (1) ; 20 Halsbury's Statutes 99. They may also invest on mortgage of a charge under the Improvement of Land Act, 1864 ; 10 Halsbury's Statutes 127 ; *ibid.*

money shall not be called in for a period not exceeding seven years, provided that interest be paid within a specified period, not exceeding thirty days, after it becomes due, and that there be no breach by the mortgagor of any covenant for the maintenance and protection of the property.¹

When lending on mortgage, however, it is essential that trustees should leave sufficient margin for depreciation. Section 8 of the Trustee Act, 1925,² provides that a trustee lending money on the security of property on which he may properly lend shall not be chargeable with a breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property, if it appears (a) that he acted upon the report of a person whom he reasonably believed to be an able practical surveyor or valuer, employed independently of the owner of the property ; (b) that the amount of the loan does not exceed two-thirds of the value of the property as stated in the report ; and (c) that the loan was made under the advice of the surveyor or valuer expressed in the report.

It is also to be noted that when there is an express power given to trustees to invest in securities outside those allowed by statute, the court will construe such power very strictly.³ And where an express power to invest in the purchase of land is given there is until the contrary is shown an implied power to sell land purchased under such power.⁴ Where such a power exists in any trust created after December 31st, 1911, by which the property is settled as personalty, any land purchased by the trustees is to be held by them as on a trust for sale, i.e., as personalty.⁵

As has already been pointed out, the selection by a trustee of the security in which to invest trust funds is a discretion, and, like every other discretion, he must, in exercising it, employ reasonable care, prudence, and intelligence. It is not sufficient that the security in which

¹ Trustee Act, 1925, sect. 10 (1) ; 20 Halsbury's Statutes 103.

² 20 Halsbury's Statutes 101.

³ *In re Maryon-Wilson Estate*, [1912] 1 Ch. 55 ; 43 Digest 935, 3729.

⁴ *In re Pope's Contract*, [1911] 2 Ch. 442 ; 43 Digest 942, 3788.

⁵ Law of Property Act, 1925, sects. 23, 32 ; 15 Halsbury's Statutes 199, 210.

he invests is one authorised by the trust instrument or by the general law ; it is his business to ascertain whether it is also a proper investment.¹ Thus, he should not, unless expressly authorised so to do, invest trust funds in speculative securities. A mortgage of land, for instance, is among the investments authorised in section 1 of the Trustee Act, 1925,² but a mortgage of a building estate where the houses have not yet been tenanted, and so have no certain market value,³ is at any rate *primâ facie* an improper investment though there is some authority for the view that it might possibly be held good where circumstances indicate that the unfinished houses will when finished be a good security.⁴ On the other hand, investment on the security of a contributory mortgage, *i.e.*, one in which several mortgagees advance the loan,⁵ or of a second mortgage,⁶ would *ipso facto* constitute a breach of trust.

Paragraph (4).

Unless it is expressly excluded by the trust instrument, a power to vary the investment of the trust funds is implied by the Trustee Act, 1925.⁷ This statutory power applies not merely to investments made under the Act, but to all investments.⁸

¹ *In re Hunt's Estate*, [1905] 2 Ch. 418 ; affirmed, [1906] 2 Ch. 11 ; 40 Digest 748, 2783.

² 20 Halsbury's Statutes 94.

³ *Leahey v. Whiteley* (1887), 12 App. Cas. at p. 731 ; 43 Digest 856, 3038.

⁴ *Shaw v. Cates*, [1909] 1 Ch. 389 ; 43 Digest 955, 3944.

⁵ *In re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328 ; 43 Digest 995, 4366.

⁶ *Chapman v. Browne*, [1902] 1 Ch. 785 ; 44 Digest 1236, 10685.

⁷ Section 1 ; 20 Halsbury's Statutes 94.

⁸ *Re Dick, Lopes v. Hume-Dick*, [1891] 1 Ch. 423 ; 43 Digest 942, 3791.

ARTICLE 46.

**Second Positive Duty : Transferring
the Trust Property.**

(1) It is an absolute duty of a trustee to pay and transfer the income and corpus of the trust property to the cestuis que trust respectively entitled thereto, or (if they are dead) to their legal representatives.

(2) Provided he acts in good faith, and without notice, a trustee is, however, justified in paying trust money :

- (i) To a person appointed by power of attorney, given by the cestui que trust, to receive it, although the cestui que trust is dead or has avoided the power ;
- (ii) To the original cestui que trust, though he has previously assigned his interest in the trust fund to another person.

Paragraph (1).

This being an absolute duty, the question of negligence does not arise ; if the trustee fails to perform it he is guilty of a breach of trust, to whatever cause his failure is due. Thus, if through the fraud of some other person the trustee is induced to pay trust money to a person who is not entitled to it,¹ or if by an honest but mistaken interpretation of the instrument of trust he distributes the trust funds wrongly,² he is liable, strictly speaking, to refund all the money improperly paid away to the cestui que

¹ *Re Bennison, Cutler v. Boyd* (1889), 60 L. T. 859 ; 24 Digest 677, 7031.

² *Hilliard v. Fulford* (1876), 4 Ch. D. 389 ; 44 Digest 769, 6279.

trust properly entitled to it. And where he has overpaid one cestui que trust, even though the overpayment is out of a share of the trust funds to which he himself is beneficially entitled, he cannot recover the overpayment, since in order to do so he would have to claim for his own breach of trust¹; but if any trust funds belonging to the overpaid cestui que trust still remain in the trustee's hands he can in adjusting accounts between himself and the overpaid cestui que trust retain out of them the amount overpaid.²

It should perhaps be noticed that where the settlement gives an annuity to a beneficiary it is the duty of the trustees to deduct income tax payable upon such annuity unless there are express directions that the annuity is to be paid free of income tax.³ Income tax in such a direction includes surtax.⁴

Paragraph (2).

A power of attorney may be revoked either by express revocation or by the death, insanity or bankruptcy of the grantor of the power. And once it is revoked the attorney's right to represent the grantor is gone, and he is unable to give a discharge to persons paying the money to him owing to the grantor, whether he or they know of the revocation or not. But by section 29 of the Trustee Act, 1925,⁵ a trustee paying money in good faith in pursuance of a power of attorney is not to be liable for any such payment by reason of the fact that at the time of the payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of paying; but any person entitled to the money has the same remedy against the person to whom the payment is made as he

¹ *In re Horne*, [1905] 1 Ch. 76; 43 Digest 961, 4005.

² *In re Ainsworth*, [1915] 2 Ch. 96; 43 Digest 961, 4004.

³ *In re Loveless*, [1918] 2 Ch. 1; 39 Digest 167, 585.

⁴ *In re Crosse*, [1920] 1 Ch. 240; 39 Digest 168, 589.

⁵ 20 Halsbury's Statutes 120.

would have had against the trustee if the section had not been passed.

The second part of the paragraph simply amounts to this, that the trustee is not bound to know what the different cestuis que trust do with their interests. Until he has notice to the contrary, he is entitled to assume that the trust property belongs to the persons entitled under the trust instrument.¹

Where the trust is discretionary, an assignee is just as much subject to the discretion as was the cestui que trust.²

ARTICLE 47.

Third Positive Duty : giving Information as to the Trust Property.

It is an absolute duty of a trustee, on the application of a cestui que trust, whether such cestui que trust's interest in the trust property is vested or contingent, to give such cestui que trust all reasonable information as to the way in which the trust property has been dealt with, and the present state of its investment, and also the opportunity and means of verifying such information. For such purpose of verification he should keep intelligible accounts which will enable the inquiring cestui que trust to see the effect of such dealings and investment upon his interest in the trust property.

In *Heugh v. Scard*,³ JESSEL, M.R., said : " In certain cases of mere neglect or refusal to furnish accounts,

¹ As to notice by, and priorities between, assignees, see *ante*, p. 49.

² *Train v. Clapperton*, [1908] A. C. 342; 43 Digest 880, 3235.

³ (1875), 33 L. T. 659; 24 Digest 827, 8595.

when the neglect is very gross or the refusal wholly indefensible, I reserve to myself the right of making the trustee pay the costs of litigation caused by his neglect or refusal.”¹

The discharge by trustees of their duty to keep proper accounts is encouraged by section 22 of the Trustee Act, 1925,² which provides that trustees may, in their absolute discretion, from time to time, but not more than once in every three years unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable, cause the accounts of the trust property to be examined or audited by an independent accountant. The costs of such an examination or audit are to be paid out of the capital or income of the trust property, or partly in one way and partly in the other, as the trustees, in their absolute discretion, think fit, but, in default of any direction by the trustees to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income. It should be noticed that although this power to have accounts audited is discretionary, the duty to keep accounts is absolute. Moreover, by section 13 of the Public Trustee Act, 1906,³ either a beneficiary or a trustee may apply to the Public Trustee for an investigation and audit of the trust accounts, but, unless the court orders otherwise, such an investigation and audit cannot be made more than once in a year. The Public Trustee has power to order the costs to be paid either by the applicant or by the trustee. From an order of the Public Trustee as to costs an appeal lies to a judge of the Chancery Division⁴; but if the Public Trustee has ordered that the costs be paid by the applicant, the judge will not set aside that order if the trust funds

¹ And see *Re Dartnell, Sawyer v. Goddard*, [1895] 1 Ch. 474; 43 Digest 829, 2741; *Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289; Stra. L. C. 133; 43 Digest 983, 4239; *In re Linsley*, [1904] 2 Ch. 785; 43 Digest 983, 4246.

² Sub-section (4); 20 Halsbury's Statutes 113.

³ 20 Halsbury's Statutes 88.

⁴ *Re Oddy*, [1911] 1 Ch. 532; 43 Digest 1036, 4766.

were properly invested and the applicant had received all reasonable information.¹

Two further points should be remembered. A trustee is bound to give information as to his own dealings with the trust funds : he is not bound to give either to the cestui que trust, or to an intending purchaser from the cestui que trust, information as to the dealings of the cestui que trust himself with his interest in the trust funds even when he has had notice of such dealings.² But, under the Law of Property Act, 1925,³ if notice in writing of any dealing with a beneficiary's interest has been received by a trustee, any person interested in the equitable interest may, subject to the payment of costs, require the trustee to produce the notice. Secondly, no agreement between trustees as to costs or expenses precludes the cestui que trust's right to an account of such costs and expenses. In *Re Fish, Bennett v. Bennett*,⁴ two trustees agreed that the costs due to one of them for work done for the trust amounted to a certain sum. The cestui que trust objected to this agreement. It was held that he was entitled to have the account investigated. And even where the cestui que trust himself agreed to the charges, on proof of overcharge the court will reopen the settled account.⁵

Remuneration does not alter the liability of the trustees, except perhaps to this extent, that a trustee who undertakes for payment to do certain work must be held to represent himself as reasonably qualified to do such work.⁶

¹ *Re Utley, Russell v. Cubitt* (1912), 106 L. T. 858 ; 43 Digest 1036, 4768.

² *Low v. Bouverie*, [1891] 3 Ch. 82 ; 43 Digest 852, 3002.

³ Section 137 (8) ; 15 Halsbury's Statutes 317.

⁴ [1893] 2 Ch. 413 ; 24 Digest 587, 6207.

⁵ *Cheese v. Keen*, [1908] 1 Ch. 245 ; Stra. L. C. 120 ; 20 Digest 276, 353.

⁶ *Jobson v. Palmer*, [1893] 1 Ch. 91 ; 43 Digest 774, 2147. And see *infra*, Art. 86.

ARTICLE 48.

First Negative Duty : not to make Profit out of the Trust Property.

(1) It is an absolute duty of a trustee not to deal with the trust property in such a way as to make for himself a personal profit out of it or out of his dealings with it.

(2) An individual trustee is not entitled to receive any remuneration out of the trust property for his work as trustee, unless—

- (i) The trust instrument expressly directs or permits him to receive such remuneration ; or
- (ii) he has, before accepting the trust, stipulated with the cestuis que trust (these being all *sui juris*) to receive remuneration ; or
- (iii) the trust property is situate abroad in a country where, by the local law or custom, trustees are entitled to remuneration ;
- (iv) the trustee is a solicitor and is engaged by his co-trustees to bring or defend an action relating to the trust property ;
- (v) remuneration is sanctioned by the court in a case where the execution of the trust is unusually burdensome ;
- (vi) the trustee is a trust corporation and the court appointing him orders remuneration ;
- (vii) the trustee is the Public Trustee or a judicial trustee.

The position of a trustee is well illustrated by *Vipont v. Butler*.¹ There a solicitor trustee who, if he had acted as solicitor, would have been entitled under the trust deed to charge ordinary professional remuneration for his services, sent certain legal work connected with the trust to another solicitor, under an arrangement by which he, the solicitor trustee, was to receive the ordinary commission for such work. It was held that as he was not the solicitor acting for the trust, the commission he received was an improper profit made by him out of his dealings with the trust property, and that he was liable to account to the trust estate for such profit. But where a trustee defends an action as solicitor for the co-trustees or acts for the cestuis que trust, the court may allow him solicitor and client costs even where the trust instrument does not authorise him to charge them.²

Even where a professional trustee is expressly authorised by the trust instrument to charge for his services, the court will permit him to charge only for his professional services.³

Where a trustee is made a director of a company, his qualification and the ground of his appointment being shares in the company which he holds as trustee, his fees as director are not a profit obtained by him out of the trust estate, but payment for his services as director, and so may be retained by him.⁴

It has been decided⁵ that if the execution of the trust is unusually burdensome the court may sanction the payment of remuneration or commission to a trustee if it is of opinion that it is desirable to do so in the interests of the estate.

¹ [1893] W. N. 64; see also *Parker v. McKenna* (1874), L. R. 10 Ch. 96; 43 Digest 781, 2220.

² *Cradock v. Piper* (1850), 1 Mac. & G. 664; 24 Digest 604, 6350.

³ *In re Chalinder and Herington*, [1907] 1 Ch. 58; 24 Digest 602, 6335.

⁴ *In re Dover Coalfield Extension, Limited*, [1907] 2 Ch. 76; affirmed, [1908] 1 Ch. 65; 9 Digest 464, 3014; *In re Lewis* (1910), 103 L. T. 495; 43 Digest 638, 764.

⁵ *Re Freeman's Settlement Trust* (1887), 37 Ch. D. 148; 40 Digest 780, 3110.

By section 42 of the Trustee Act, 1925,¹ where the court appoints a corporation, other than the Public Trustee, to be a trustee either solely or jointly with another person, the court may authorise the corporation to charge such remuneration as the court thinks fit. By section 9 of the Public Trustee Act, 1906,² the Public Trustee may charge fees fixed by the Treasury; and by section 1 of the Judicial Trustee Act, 1896,³ the court may assign remuneration out of the trust property to a judicial trustee, whether an official of the court or not.

Though a trustee is not entitled, save under the conditions set out in the Article, to receive profits out of the trust property, he is, as we shall see, always, when he acts properly, entitled to an indemnity for all costs and expenses reasonably incurred by him in connection with the trust estate.

ARTICLE 49.

Second Negative Duty: not to Purchase the Trust Property from himself or his Co-trustees.

(1) It is an absolute duty of a trustee, as long as he remains a trustee, not to buy or to take a lease or a mortgage of the trust property for his own benefit, either from himself or from himself and his co-trustees. This duty imposes on the trustee an absolute incapacity to take a good title to the trust property in breach of the duty.

(2) This incapacity continues after he has ceased to be a trustee where, from the circumstances, the court is of opinion that he ceased

¹ 20 Halsbury's Statutes 139.

² 20 Halsbury's Statutes 87.

³ 20 Halsbury's Statutes 76.

to be a trustee with a view of qualifying himself to buy or to take a lease or mortgage of the trust property.

(3) The incapacity, while he remains a trustee, can be removed only—

(i) by virtue of an express power in that behalf contained in the trust instrument ; or

(ii) by the consent of the court.

The point to be noted here is not as to a purchase by the trustee from the cestui que trust—which under proper conditions is quite legal—but as to a purchase by a trustee from himself or from his co-trustees, which is in ordinary circumstances quite illegal.¹

Practically, save where, as stated in the Article, the sale is in pursuance of a special power—as where a testator gives one of his trustees a right to buy his business at a certain price within a certain time—or where the court gives a trustee express permission to buy, all purchases of trust property by a trustee from himself or his co-trustees are liable to be set aside by the court without any evidence that the purchase was unfair, or that the trustee took any improper advantage in the transaction.²

Where, however, the trustee has before the purchase ceased to be a trustee, then the validity of the purchase by him of property of which he once was trustee depends on the view of his conduct the court takes on the evidence. That is, the purchase is not *ipso facto* voidable ; it is voidable only if the court comes to the conclusion that the former trustee acted improperly. Thus, in *In re Boles and British Land Company's Contract*,³ a trustee, after twelve years' retirement from the trust, bought the trust property. There was no evidence whatever that he had retired with any view of subsequently pur-

¹ *Williams v. Scott*, [1900] A. C. 499 ; 43 Digest 782, 2221.

² *Fox v. Mackreth* (1788), 2 Bro. C. C. 400 ; 43 Digest 780, 2206.

³ [1902] 1 Ch. 244 ; 43 Digest 781, 2214.

chasing the trust property, nor that he took any unfair advantage of the knowledge of the property which he had acquired as trustee. It was held that in the absence of such evidence the purchase was quite valid.

The rule prohibiting purchases from co-trustees extends to purchases from other purchasers from the trustees while the contract of purchase with the trustees is executory. Thus, in *Williams v. Scott*,¹ a trustee agreed to sell certain trust property to A. A. being unwilling or unable to complete the transaction, the trustee took over the contract and accepted a conveyance. Subsequently the trustee resold, but the purchaser, on investigation of title, refused to complete, on the ground that the trustee's title was not good, being based on a purchase from himself as trustee. It was held that this objection was good.

The rule applies not merely to express trustees, but to every one in a fiduciary position, such as the director of a company,² the receiver of an estate,³ the life tenant of an equity of redemption,⁴ etc.

ARTICLE 50.

Third Negative Duty: not to Delegate his Duties.

(1) Subject to the powers hereinafter mentioned, it is an absolute duty of a trustee not to delegate the performance of his duties either to his co-trustees or to an agent.

(2) A trustee has power to delegate duties—

(i) Where and in so far as such delegation is practically unavoidable, or is usual

¹ *Supra*.

² *Parker v. McKenna* (1874), L. R. 10 Ch. 96; 43 Digest 781, 2220.

³ *Nugent v. Nugent*, [1908] 1 Ch. 546; 39 Digest 67, 776.

⁴ *Griffiths v. Owen*, [1907] 1 Ch. 195; 43 Digest 636, 739.

in the ordinary transactions of business of the nature of the duty delegated ;

- (ii) Where such delegation is specifically permitted by the trust instrument ;
- (iii) Where such delegation is specifically permitted by statute.

Paragraphs (1) and (2).

The case which perhaps best illustrates the modern view of the above rule is *Re De Pothonier, Dent v. De Pothonier*.¹ There the trustees held as part of the trust investments certain bearer securities with coupons attached for the payment of the annual interest due on the securities. These were deposited with a banker with authority given him to remove from time to time the coupons, and claim the interest on behalf of the trustees as it became due. This was held a proper delegation of the duties, since it was the conduct which would be followed by any reasonably prudent man looking after his own affairs.

An example of what may be considered a practically unavoidable delegation is afforded by the case of *Field v. Field*.² There the trustees held a building estate which was being let off from time to time in plots. In order to save the constant reference to the trustees to produce title-deeds to prove title, the trustees left these with the solicitors for the trust estate. It was held that under the circumstances this was perfectly reasonable, and therefore proper.

The power of a trustee to delegate in cases where a prudent man of business, acting on his own behalf, would delegate is now recognised by statute. We have already

¹ [1900] 2 Ch. 529 ; 43 Digest 857, 3042.

² [1894] 1 Ch. 425 ; 43 Digest 853, 3003. See also *Re Brier, Brier v. Evison* (1884), 26 Ch. D. 238 ; 43 Digest 888, 3322 ; *Speight v. Gaunt* (1884), 9 App. Cas. 1 ; 43 Digest 884, 3273 ; *In re O'Flanagan and Ryan's Contract*, [1905] 1 R. 280.

seen,¹ for instance, that a trustee proposing to lend money on the security of property on which he may properly lend is encouraged to delegate the duty of valuing the proposed security to a practical surveyor or valuer. And section 23 of the Trustee Act, 1925,² confers a power of delegation in very wide terms. It provides that trustees, unless forbidden by the trust instrument, may employ and pay an agent, whether a solicitor, banker, stockbroker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred and shall not be responsible for the default of any such agent if employed in good faith. The same section also gives to trustees a wide power of appointing any person to be their agent or attorney in connection with any property, real or personal, movable or immovable, subject to the trust in any place outside the United Kingdom; and it also provides that, without prejudice to his general power of appointing agents, (i) a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing a receipt, and (ii) a trustee may appoint a banker or solicitor to be his agent to receive money payable under a policy of insurance, by permitting the solicitor or banker to have the custody of, and to produce, the policy with a receipt signed by the trustee. But when once the money or valuable consideration or property has been received by the solicitor or banker and the trustee knows, or ought to know, of its receipt, it is the duty of the trustee to use reasonable diligence in getting it transferred to himself³; and the section does not exempt the trustee from liability if he permits the money, valuable consideration, or property to remain in the

¹ *Ante*, p. 145.

² 20 Halsbury's Statutes 113.

³ *Wyman v. Paterson*, [1900] A. C. 276; 43 Digest 885, 3279; *Re Sheppard, De Brimont v. Harvey*, [1911] 1 Ch. 50; 43 Digest 885, 3280.

hands or under the control of the solicitor or banker for a longer period than is reasonably necessary to enable him to pay or transfer it to the trustee. A further power of delegation is conferred by section 25 of the Trustee Act, 1925,¹ which provides that a trustee intending to remain out of the United Kingdom for a period exceeding one month may, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence of all or any trusts, powers or discretions vested in him as such trustee, either alone or jointly with any other person or persons. He cannot delegate to his co-trustee, however, unless the co-trustee is a trust corporation ; and, in any case, the trustee remains liable for the acts or defaults of his attorney as if they were his own.

It is to be noted that, in order to render any delegation proper, it is necessary not merely that the circumstances should be such as to justify the trustee in delegating his duties, but also that the delegation should be to a proper agent. However right it may be that the trustee should delegate his duties, if he employs, say, a stock-broker to do what is properly a banker's business, or a lawyer to do what is properly a valuer's business, he is guilty of negligence in exercising his power to delegate, and so is liable for breach of trust.²

ARTICLE 51.

A Trustee's Equitable Powers.

In addition to powers specifically given by the trust instrument or by statute, a trustee has implied or equitable powers to do any act or execute any instrument which may be reason-

¹ 20 Halsbury's Statutes 116.

² *Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674 ; 43 Digest 887, 3301.

ably necessary for the purpose of carrying out the duties imposed on him by the general law or the trust instrument.

The duties of a trustee have been stated. It necessarily follows that he must have the powers necessary to enable him to carry out such duties. Thus he has an implied power to take such proceedings as may be necessary to protect the trust estate.¹ Again, he has power where the immediate realisation of the trust estate would be disastrous to postpone it.² Where express powers are given by the trust instrument, they carry with them all the powers necessary to make them effective. Thus, where the trustee is given the management of the trust estate, he has power to do the necessary repairs,³ and to grant reasonable leases.⁴

ARTICLE 52.

Statutory Power : as to selling Trust Property.

Independent of legislation when by the trust instrument a trustee is entitled to sell trust property, he may sell it in whatever mode he may decide is for the benefit of his cestui que trust ; but most of the powers of trustees in relation to sales by them are now defined by statute.

By section 12 of the Trustee Act, 1925,⁵ where a trust for sale or a power of sale of property is vested in a trustee,

¹ *Re Ormrod's Settled Estate*, [1892] 2 Ch. 318 ; Digest Supp. ; *Stott v. Milne* (1884), 25 Ch. D. 710 ; 43 Digest 826, 2714.

² *Ward v. Ward* (1843), 2 H. L. Cas. 777, at p. 784 ; 43 Digest 850, 2982.

³ *Re Fowler, Fowler v. Odell* (1881), 16 Ch. D. 725 ; 43 Digest 800, 2372.

⁴ *Fitzpatrick v. Waring* (1882), 11 L. R. Ir. 35 ; 43 Digest 891, 3348ii.

⁵ 20 Halsbury's Statutes 106.

he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss. Moreover, since 1925, the trustee may sell surface and minerals separately.

But although trustees who have power to sell have these wide statutory powers in connection with any sale, they should be careful not to make the conditions of sale unduly depreciatory. Section 13 of the Trustee Act, 1925,¹ it is true, provides that the title of the purchaser cannot be impeached on the ground of unnecessarily depreciatory conditions, unless it appears that the purchaser and the trustee were acting in collusion. But the effect of another provision of the same section is that if unnecessarily depreciatory conditions have rendered the consideration for the sale inadequate the beneficiaries may stop the sale before completion; and even after completion it would appear that the trustee will be personally liable for the loss.

ARTICLE 53.

Statutory Power : to Arrange as to Debts and Disputes Relating to Trust Property.

By section 15 of the Trustee Act, 1925,² two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation,³ a sole acting trustee where by the instrument, if

¹ 20 Halsbury's Statutes 106.

² 20 Halsbury's Statutes 108.

³ *Ante*, p. 105; *post*, p. 163.

any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they think fit—

- (a) accept any property before the time at which it is made transferable or payable ; or
- (b) sever and apportion any blended trust funds or property ; or
- (c) pay or allow any debt or claim on any evidence that he or they think sufficient ; or
- (d) accept any composition or any security for any debt or for any property claimed ; or
- (e) allow any time of payment of any debt ; or
- (f) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the trust ;

without being responsible for any loss occasioned by any act or thing done by him or them in good faith.

ARTICLE 54.

Statutory Power : to give Receipts for Trust Property.

(1) By section 14 of the Trustee Act, 1925,¹ notwithstanding any direction to the contrary in the trust instrument a trustee has power to give a receipt in writing for any money,

¹ 20 Halsbury's Statutes 107.

securities, or other personal property owing to him as trustee, which shall be a sufficient discharge for them, and shall effectually discharge the person who owed them from seeing to their application or being answerable for their loss.

(2) This does not enable a sole trustee, unless such trustee is a trust corporation, to give a receipt for the proceeds of the sale of land held on trust for sale or for capital money arising under the Settled Land Act, 1925.¹

ARTICLE 55.

Statutory Powers of Management.

By section 28 of the Law of Property Act, 1925,² trustees for sale of land have all the powers of a tenant for life and of the trustees of a settlement under the Settled Land Act, 1925.³

The powers are very extensive and any reader who is not familiar with them already would be well advised to consult a work on the law of property in land.

ARTICLE 56.

Statutory Power : to Insure Insurable Trust Property.

(1) By section 19 of the Trustee Act, 1925,⁴ subject to the directions contained in the trust instrument, a trustee has power to insure

¹ 17 Halsbury's Statutes 833.

³ 17 Halsbury's Statutes 833.

² 15 Halsbury's Statutes 120.

⁴ 20 Halsbury's Statutes 110.

insurable trust property (provided such property is not property he is bound to convey to the cestui que trust absolutely on being required so to do) to any amount not exceeding three-fourths of its value. On doing so he may pay the premiums out of the income of the property insured or of any other property subject to the same trusts without the consent of the cestui que trust for the time being entitled to such income.

(2) By section 20¹ the money receivable under such policy of insurance shall in case of a trust of land for sale be held by the trustees on the same trusts as the proceeds of the sale would be held if the land were sold or may be applied for the reinstatement of the property insured.

Paragraph (1).

Chattels settled to accompany the land are insurable property within this enactment.²

ARTICLE 57.

Statutory Power : to Allow Maintenance for Cestui que Trust.

(1) Trustees who hold property, under an instrument coming into operation before 1926, in trust for an *infant* for life or for a greater interest, and, either absolutely or contingently,

¹ 20 Halsbury's Statutes 110.

² *In re Earl of Egmont's Trusts*, [1908] 1 Ch. 821 ; 40 Digest 795, 3241. As to the right of a remainderman to insist on the money being used for rebuilding and repairs, see *In re Quicke's Trusts*, [1908] 1 Ch. 887 ; 40 Digest 681, 2168.

to vest not later than his attaining twenty-one years of age, have power, provided the property is a portion or the gift of it carries the income, to pay to the infant's parent or guardian or to apply in their discretion for the benefit of the infant, the income of that property, or any part thereof. Subject to this power, it is the duty of the trustees to accumulate the income by way of compound interest for the benefit of the person who ultimately becomes entitled to the settled property.

(2) Where the instrument creating the trust came into operation after 1925, and under it any property is held by trustees in trust *for any person for any interest whatsoever*, whether vested or contingent, then, subject to any prior interests or charges affecting the property, (i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable; and (ii) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees *must* thenceforth pay the income of that property and of any accretion thereto to him, until he either attains a vested interest or dies, or until failure of his interest. Subject to this power, the trustees must accumulate the income by way of compound interest. If the person for whom the property is held in trust has a vested interest, he becomes absolutely entitled to the accumulations on his attaining twenty-one or marrying under that age. He also

becomes absolutely entitled to the accumulations if on attaining twenty-one or marrying under that age he becomes entitled to the property from which the income arose in fee simple, or absolutely, or for an entailed interest. In all other cases the accumulations must be held by the trustees as an accretion to capital.

Paragraphs (1) and (2).

Paragraph (1) is a summary of section 43 of the Conveyancing Act, 1881, and paragraph (2) expresses the effect of section 31 of the Trustee Act, 1925.¹ It will be seen that the latter enactment is in wider terms than the former, and, in particular, while the Act of 1881 is confined to property held in trust for *an infant for life or for any greater interest*, the Act of 1925 applies to property held in trust for *any person for any interest whatsoever*. But, whilst under the Act of 1881 the discretion of the trustees is an absolute one, under the Act of 1925 it is somewhat fettered because the power of the trustees is to apply such part, if any, of the income as is *reasonable*, and section 31 of the Act of 1925² expressly directs the trustees to "have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes."

Where the property held is pure personalty, and there are several infants jointly entitled to it on severally attaining twenty-one, it seems that each infant on attaining twenty-one is entitled only to the income on an aliquot part of the fund, so that the trustees may still apply the income of the shares of those who are yet under age for their maintenance.³ But, according to the law in force before 1926, if the property was realty the first child to attain twenty-one was entitled to the whole income until the next child attained that age, when he

¹ 20 Halsbury's Statutes 122.

² *Ibid.*

³ *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30; 44 Digest 787, 6441.

became entitled to a share, and so on.¹ This, probably, is still the law if the trust is created by an instrument *inter vivos* ; but it appears to be overruled if the trust of realty is contained in the will of a testator who died after 1925, because section 175 of the Law of Property Act, 1925,² provides that a contingent specific or residuary devise of freehold land shall carry the intermediate income of the property from the death of the testator, except so far as such income or any part thereof may be otherwise expressly disposed of.

ARTICLE 58.

Statutory Power : To Advance Infant Cestui que Trust.

Where a trust is created after 1925, the trustees are entitled in their discretion to advance to a cestui que trust entitled absolutely or contingently on his attaining a certain age or on the occurrence of any other event, or subject to a gift over on his death under a specified age or on the occurrence of any other event, and whether his interest is in possession or in expectancy or is subject to a power of appointment or revocation or to be diminished by additions to the class to which he belongs, so much of his prospective share of the trust property as shall not exceed one half.

Formerly, while trustees had power, as we have seen, to apply income for an infant's benefit they had no power to advance capital, unless the court or the trust instrument authorised them to do so. This power is now

¹ *Re Averill, Salisbury v. Buckle*, [1898] 1 Ch. 523 ; 44 Digest 787, 6443. It would be otherwise, if the gift was expressly one of income ; see *Re Bird*, [1927] 1 Ch. 210 ; 44 Digest 788, 6447.

² 15 Halsbury's Statutes 357.

given by section 32 of the Trustee Act, 1925.¹ It applies only where the trust property is money or securities or property held on trust for sale and is not by statute or in equity considered as land or applicable as capital money for the purposes of the Settled Land Act, 1925.² If the person to whom an advance is made is or becomes absolutely and indefeasibly entitled to a share in the trust property, the advance must be brought into account, and no advance can be made to the prejudice of a person entitled to a prior interest, whether vested or contingent, unless that person is in existence and of full age and consents in writing. This statutory power to advance may be negatived by the trust instrument.

ARTICLE 59.

Jurisdiction of Court to give Trustees Powers outside Trust Instrument.

The court has jurisdiction to authorise the trustees to do an act which is not within the powers vested in them by the trust instrument.

Formerly this jurisdiction was exercised only in cases of emergency, and the principle was thus stated by ROMER, L.J., in *Re New*³: "The court may on an emergency do something not authorised by the trust. It has no general power to interfere with or disregard the trust; but there are cases not foreseen or provided for by the author of the trust, where circumstances require that something should be done."

But the jurisdiction of the court to sanction a departure from the trust instrument has been considerably increased by section 57 of the Trustee Act, 1925,⁴ which provides that where in the management or administration of any

¹ 20 Halsbury's Statutes 125.

² 17 Halsbury's Statutes 833.

³ [1901] 2 Ch. 534, at p. 543; 43 Digest 840, 2866. See also *Re Tollemache*, [1903] 1 Ch. 955; 43 Digest 841, 2867.

⁴ 20 Halsbury's Statutes 149.

property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose. The section does not apply, however, to trustees of a settlement for the purposes of the Settled Land Act, 1925.¹

ARTICLE 60.

Trustee's Right to an Indemnity out of the Trust Property.

(1) A trustee is entitled to reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of his trust and powers. For this purpose, though such expenses are primarily payable out of the corpus, the trustee has, until they are discharged, a lien for them on both the income and corpus of the trust property.

(2) Where a cestui que trust absolutely entitled and *sui juris* accepts the beneficial estate in the trust property, the trustee has a personal right against such cestui que trust to be indemnified against such expenses, and such right continues after the cestui que trust has assigned the beneficial estate to a new cestui que trust, even though the trustee concurred in such assignment and accepted an indemnity from the new cestui que trust.

¹ 17 Halsbury's Statutes 833.

Paragraph (1).

This has always been the law,¹ and the rule now is expressly enacted in section 30, sub-section 2 of the Trustee Act, 1925.² The rule, however, does not enable a trustee to recover from the trust estate the costs of defending a suit solely for the purpose of repelling charges of personal misconduct.

In *Walters v. Woodbridge*³ a trustee had compromised certain claims against the trust estate. His action in so doing was impugned by the cestuis que trust, and an action was brought to have the compromise set aside on the ground that it was fraudulent. The action was decided in favour of the trustee. He claimed to have his costs out of the trust estate. Lord ROMILLY held that, the action being against his personal character, he was not entitled to this. On appeal,⁴ JESSEL, M.R., without questioning the principle that a trustee must himself bear the cost of repelling personal charges, held that, though the trustee's personal conduct was impeached, nevertheless the action was in substance one to set aside a compromise which, it had been held, was for the benefit of the trust property. It was therefore an action relating to the trust property in part at any rate, and such being the case, the trustee was entitled to an indemnity for the costs to which he had been put.

Compare with this the case of *Re Dunn, Brinklow v. Singleton*,⁵ where a receiver—who for this purpose is in the same position as a trustee—was simply sued for fraudulent dealing with the estate. He proved his innocence, and as the plaintiff was a man of straw, from whom he could obtain no costs, he desired to have these made a charge on the estate. It was held that as his success in the action could not possibly benefit the trust estate, he was not entitled to have this done.

In *Stott v. Milne*,⁶ the plaintiff was tenant for life of

¹ See *Walters v. Woodbridge* (1872), 20 W. R. 520.

² 20 Halsbury's Statutes 121.

⁴ (1878), 7 Ch. D. 504; 43 Digest 823, 2666.

⁵ [1904] 1 Ch. 648; 43 Digest 821, 2651.

⁶ (1884), 25 Ch. D. 710; 43 Digest 826, 2714.

³ *Supra*.

certain freehold property of which the defendants were trustees. He had warned them that if they did not bring actions in respect to certain interferences with the property, he should hold them liable. They, on the advice of counsel, brought an action which they compromised before trial. The plaintiff then, on the ground that the particular action was not brought with his knowledge or consent, claimed that the costs of it were not payable out of either the income or the corpus. It was held that as the action was properly brought for the protection of the trust property, they were a charge on both.

The rule will not extend to speculative litigation, even though the trustee has acted in good faith; and if speculative litigation is unsuccessful the trustee must bear the costs himself, even though he has acted on counsel's advice.¹ It is only where the court is of opinion that if it had been applied to it would have sanctioned the proceedings that the trustee can claim indemnity; and for that reason trustees usually obtain in advance the leave of the court to sue or defend.

Where the trustees are not personally to blame they have a first right to be indemnified out of the trust property, even where the trust is fraudulent,² or where the beneficiary has mortgaged or assigned his interest in the trust funds and the mortgagees or assignees have stood by and permitted the costs to be incurred by the trustees.³

Paragraph (2).

In *Haroon v. Belilios*,⁴ the plaintiff had certain partly paid up shares bought by his employers registered in his name; he held them of course as presumptive trustee for his employers. Subsequently these shares were transferred by the employers to the defendant,

¹ *Re Yorke, Barlow v. Yorke*, [1911] 1 Ch. 370; 40 Digest 769, 3011. *In re England's Settlement Trusts*, [1918] 1 Ch. 24; 43 Digest 826, 2705.

² *Ideal Bedding Company, Ltd. v. Holland*, [1907] 2 Ch. 157; 43 Digest 825, 2697.

³ *In re Pain*, [1919] 1 Ch. 38; 43 Digest 818, 2616.

⁴ [1901] A. C. 118; 43 Digest 761, 2045.

the plaintiff still continuing the registered and therefore legal owner. Calls having been made upon the plaintiff in respect to the shares, he claimed a personal indemnity from the defendant. It was held that in the absence of any contract to the contrary he was entitled to this. But if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates, the liabilities incidental to one of them cannot be thrown on the beneficial owners of the others.¹ But where the only cestui que trust is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the cestui que trust a personal obligation enforceable in equity to indemnify his trustee. And this right to an indemnity continues after the cestui que trust has parted with the beneficial estate. Thus, in *Matthews v. Ruggles-Brise*,² two partners in a firm took, on the firm's behalf, a lease of land which contained onerous covenants. They were, as has been stated, entitled to an indemnity from the partnership on trust for which they held it. The partnership was wound up and a company took over the beneficial interest in the lease. The company subsequently made default, and the two former partners had to liquidate the liabilities under the covenants in the lease. It was held that they were entitled to an indemnity from all the persons who formed the partnership when the lease was taken, although the company had in the assignment covenanted to indemnify the trustees.

As an example of a contract which may exclude the trustee's right to a personal indemnity from the cestuis que trust absolutely entitled, the case of a club trust may be taken. Thus, in *Wise v. Perpetual Trustee Company Limited*,³ the appellant was a member of a club in Sydney, Australia, called the Cercle Français.

¹ *Fraser v. Murdoch* (1881), 6 App. Cas. 855; 43 Digest 931, 3684.

² [1911] 1 Ch. 194; 43 Digest 761, 2046.

³ [1903] A. C. 139; 43 Digest 763, 2065.

He had been a member when certain leasehold premises were taken by the trustees of the club, and remained a member until the club ceased. The trustees were made liable for the rent of these premises, and claimed an indemnity from the members. It was held that their only remedy was against the club (*i.e.*, the trust) property. The feature, said Lord LINDLEY, which distinguishes clubs is "that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed, but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognised."

ARTICLE 61.

Trustee's Right to the Protection of the Court.

(1) A trustee is entitled, where it is reasonably necessary for his protection so to do, to obtain by originating summons at the expense of the trust property the direction of the court on any question within rule 3, Order 55, of the Rules of the Supreme Court.

(2) Where such a course is reasonable, the trustees or a majority of them having in their hands or under their control money or securities belonging to a trust are entitled to pay the same into the High Court to be dealt with according to its orders.

(3) Where such a course is reasonable, and

the trust property is not capable of being paid into the High Court, a trustee is entitled to institute an action for the administration of the trusts by the court.

Formerly, the only mode in which a trustee could in case of difficulties arising in the construction of the trust instrument or in the execution of the trust obtain the protection of the court, was by an action for the general administration of the trust estate, and advice on any particular point was not given by the court as a rule until all the trustee's accounts had passed the Master. Now a much simpler and cheaper mode of getting the directions of the court is provided by the rule cited in the Article, and though it is the practice in taking out summonses under that rule to apply also under rule 4 for administration "as far as the same is necessary," that is intended merely to give the court a wider jurisdiction as to the order to be made than it would otherwise have. Rule 10 of Order 55 now provides that the court, even when general administration is asked for, need not issue any order or judgment for administration if the questions before it can be properly determined without it.

The matters within rule 3 are (a) any question affecting the rights or interests of the persons claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust; (b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others; (c) the furnishing of any particular accounts by the executors, administrators, or trustees; (d) the payment into court of any money in the hands of the executors, administrators, or trustees; (e) the direction of the executors, administrators, or trustees to do or abstain from doing any particular act in their character as such executors, or administrators, or trustees; (f) the approval of any sale, purchase, compromise, or other transaction; (g) the determination of any question arising in the administration of the trust.

Payment into court is one of the very few acts which a majority of trustees under a private trust may perform

and compel the dissentient minority to accept their decision.¹

ARTICLE 62.

Trustee's Right to a Discharge on Complete Performance of the Trust.

Upon the complete performance of the trust or on the determination of the trust by the act of the cestuis que trust under Article 65 a trustee is entitled to have a discharge from the cestuis que trust, or on their refusal to give him one to have his accounts taken in court.

As a rule a trustee, unlike an executor, is not entitled to a release under seal, although in practice such a release often is given to him.²

ARTICLE 63.

Effect of a Direction or Judgment of the Court on a Trustee's Powers.

A direction to a trustee under paragraph (1) of Article 61 does not interfere with the powers of the trustee except so far as such interference may necessarily be involved in the particular relief sought. A judgment in an administration action under paragraph (3) of the same Article does not deprive the trustee of the powers vested in him, but henceforth he can

¹ See Trustee Act, 1925, sect. 63 ; 20 Halsbury's Statutes 153.

² *King v. Mullins* (1852), 1 Drew. 308 ; 43 Digest 758, 2020.

exercise such powers only subject to the supervision and sanction of the court.

The leading case on the effect of an order for administration on the powers of a trustee is *Minors v. Battison*.¹ There a testator left all his property to trustees to hold for the widow for life, and then for the children. Part of the estate consisted of a newspaper, which the will empowered the trustees to carry on during the widow's life. An absolute discretion was given them to sell on the widow's death all the estate, including the newspaper. In 1866 a suit for administration was commenced, in which a decree was made. By an order made in 1870, when the widow was dead, it was declared that it was for the benefit of all parties that the newspaper should not be sold. It was held that after the decree, the trustees, whether their discretion to sell was absolute or not, could not exercise it without the previous sanction of the court.

¹ (1876), 1 App. Cas. 428 ; 43 Digest 881, 3246.

A. PRIVATE TRUSTS (*continued*).

CHAPTER 4.

CESTUIS QUE TRUST AND THEIR RIGHTS.

SUMMARY.

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ARTICLE 64.

Position of Cestui que Trust who is a Life Tenant.

Where a cestui que trust is entitled in possession to be paid the net rents and profits of the trust property for a life or other limited estate—

- (1) the court may, where the trust property is land, in the exercise of its discretion, put him in possession of the land itself or the gross rents, whether the trustee consents thereto or not ;
- (2) he may, without the previous consent of the court, bring an action to protect the trust property, and in such a case

the court will give him an indemnity out of the trust property, provided the action was one which, had it been applied to, the court would have authorised.

Paragraph (1).

The cestui que trust entitled in possession to a limited interest in the equitable estate cannot claim as of right to be put in possession of the trust property, but the court in the exercise of its discretion will put him in possession provided due securities are given for the protection of the property. Thus, in *Re Hunt, Pollard v. Geake*,¹ an equitable life tenant of a freehold farm was put into possession of the rents paid by the lessee of the farm upon giving undertakings (among other things) to keep the farm buildings insured to the satisfaction of the trustees, keep down interest on incumbrances and pay all outgoings, see that the lessee performed the covenants in his lease, pay a person appointed by the court to inspect the property once a year and report to the trustees, and so on.

Paragraph (2).

The proper course for a life tenant of settled lands to take is to apply for the previous sanction of the court under section 92 of the Settled Land Act, 1925.² But in case he does not so apply, the court will, in hearing an application, after action brought, for an indemnity for the costs out of the settled property, treat the application as if it were an application for its sanction to the bringing of the action, and may order payment out of the trust estate even where the application was made by the life tenant after he had abandoned the action and himself paid the costs.³ Mere advice of counsel that

¹ [1901] W. N. 144. See also *Re Newen*, [1894] 2 Ch. 297; 40 Digest 643, 1811.

² 17 Halsbury's Statutes 927.

³ *In re Wilkie's Settlement*, [1914] 1 Ch. 77; 40 Digest 769, 3012.

the action should be brought is not in itself sufficient to show that the action was proper.¹ It is to be remembered that the trustees of the settlement may bring an action to protect the trust property, and are entitled in a proper case to an indemnity out of the trust property, even though the life tenant did not consent to the bringing of the action.²

ARTICLE 65.

Right of Cestui que Trust to Determine the Trust and Discharge the Trustee.

(1) Notwithstanding any directions contained in the trust instrument, and notwithstanding any rule of law hereinbefore stated, a trustee may be discharged of the duties of his trust and the trust itself determined by the sole cestui que trust, or, if there be more than one, by all the cestuis que trust, provided such sole cestui que trust or all such cestuis que trust is or are (i) *sui juris* (ii) and absolutely entitled, solely or jointly, to the whole equitable ownership of the trust property.

(2) The trust may be determined by the trustee, at the direction or with the consent of the sole cestui que trust or all the cestuis que trust—

- (i) conveying the trust property to the sole cestui que trust or one or more of the cestuis que trust,
- (ii) conveying the trust property to a third person or third persons,
- (iii) himself purchasing the trust property.

¹ *In re Yorke, Barlow v. Yorke*, [1911] 1 Ch. 370; 40 Digest 769, 3011.

² *Stott v. Milne* (1884), 25 Ch. D. 710; 43 Digest 826, 2714.

(3) Provided that—

- (i) a discharge given by the cestui que trust to the trustee may be set aside where before granting it the cestui que trust was not fully informed of all the material facts bearing upon it, and
- (ii) a sale of the trust property by the cestui que trust to the trustee may be set aside where the trustee is unable to show that, before the sale, the cestui que trust was fully informed of all the material facts known to the trustee bearing upon it, and that the price he gave for the trust property was, under the known circumstances, fair and reasonable.

Paragraph (1).

When a person is not under disability of any kind and is absolutely entitled in equity to trust property, he is entitled to direct the trustees to do what he wishes with such property quite independently of any directions in the trust instrument as to how it is to be used. This rule applies equally to trusts in favour of persons and trusts for charities,¹ but the two commonest examples of its operation are these: (i) Where a settlor settles property subject to a direction that part only of the income shall be paid to the cestui que trust till he attains some age beyond his legal majority—such as twenty-six years. Here if the gift is absolute the cestui que trust on attaining twenty-one can direct the trustees to transfer the settled property to him in spite of the direction in the instrument of trust,² and as to gifts to charities corporate or incorporate the same rule applies.³ (ii) Where

¹ *Wharton v. Masterman*, [1895] A. C. 186; 8 Digest 329, 1115.

² *Gosling v. Gosling* (1858), Johns. 265; 43 Digest 604, 506; *In re Williams*, [1907] 1 Ch. 180; 44 Digest 1098, 9481.

³ *Wharton v. Masterman*, [1895] A. C. 186; 8 Digest 329, 1115.

money is left to trustees to purchase a life or other annuity for a cestui que trust. Here the cestui que trust can claim the money left for this purpose and decline to have it invested in an annuity.¹

This rule, it is to be noted, applies only when the cestui que trust is absolutely entitled. Thus in the case of annuities where there is a gift over to another on any attempt of the cestui que trust to alienate the annuity or on his bankruptcy, he is not entitled to claim the capital.² And even without such restriction on alienation the right to claim the capital may be defeated by directing an annuity to be purchased for the life of the annuitant and, for example, one year more, the last year's income to go into the testator's residuary estate. Here the annuitant is only partly entitled to the annuity, and so cannot claim the capital sum; but of course, unless subject to disability, he or she may alienate his or her interest in the annuity. It is to be noted, too, that any particular person who is a cestui que trust under a discretionary trust for the benefit of a class—such as A. and his children—is not entitled to any particular part of the trust fund, and so the trust can be determined only by all the cestuis que trust who are to be benefited under the trust joining together and jointly directing the determination of the trust.³ And even then the trust can be determined only if the trustees are directed to apply *all* the property for their benefit. Here the cestuis que trust are jointly absolutely entitled and so come within the rule when they act jointly. A similar discretionary trust for the benefit of one person only comes also, of course, within the rule.⁴

The rule applies equally—as the above examples show—to simple and special trusts. The only difference is that while simple trusts are usually for the benefit of one cestui que trust only, special trusts are for the benefit almost invariably of a number of cestuis que trust, some of whom usually are under some disability, and

¹ See *Re Ross, Ashton v. Ross*, [1900] 1 Ch. 162; 23 Digest 421, 4923.

² *Power v. Hayne* (1869), L. R. 8 Eq. 262; 44 Digest 1181, 10212.

³ *Re Coleman, Henry v. Strong* (1888), 39 Ch. D. 443; 44 Digest 1100, 9492.

⁴ *In re Williams*, [1907] 1 Ch. 180; 44 Digest 1098, 9481.

in any event all of whom must join in determining the trust. The rule applies also where the interests of the cestuis que trust are not all immediate, but successive, *e.g.*, limitation of Blackacre in trust for A. for life and then to his children B., C., and D. equally in fee. Here, if A., B., C., and D. are all *sui juris* they may combine to determine the trust during A.'s life when B., C., and D.'s interests are in remainder just as well as B., C., and D. could after A.'s death combine for the same purpose when their interests would be in possession.¹ The sole point is whether all the beneficiaries are agreed to determine the trust and are between them absolutely entitled to the trust property, whether in possession or in succession or alternatively at the discretion of the trustees. Where the possible beneficiaries include the children of any person the rule cannot, strictly speaking, ever be satisfied while such person lives, since the legal view is that no person is ever incapable of having issue; but as a matter of practice, where the person whose children are possible cestuis que trust is a woman past the age of child-bearing, the court recognises this fact, and permits the persons then cestuis que trust to act as if they were the sole possible cestuis que trust.²

One of several cestuis que trust who has become absolutely entitled to his share of trust property held in trust for sale with power to postpone its sale indefinitely, cannot compel the trustees to sell in order that he may receive his share of the proceeds³; but where the power to postpone is merely to postpone for a reasonable time and there is no good reason why the sale should be postponed indefinitely, then the cestui que trust whose shares have become absolutely vested may compel the trustees to sell.⁴

Paragraphs (2) and (3).

Purchases by a trustee from himself or his co-trustees of the trust property are, as we have seen, always voidable

¹ *Saunders v. Vautier* (1841), Cr. & Ph. 240; 32 Digest 399, 4699.

² *Re Blundell*, [1901] 2 Ch. 221; 27 Digest 127, 1039.

³ *In re Horsnail*, [1909] 1 Ch. 631; 43 Digest 900, 3433.

⁴ *In re Marshall*, [1914] 1 Ch. 192; 43 Digest 868, 3128.

except when they have been made with the sanction of the court or under an express power contained in the trust instrument. Purchases from the cestuis que trust are not, however, voidable except for cause. Any failure, however, on the trustee's part to disclose to the cestui que trust any matter within his knowledge which would or might influence the cestui que trust's mind as to the bargain will render the sale voidable as against the trustee. The rule is thus stated by Lord CAIRNS in *Thomson v. Eastwood*¹: "There is no rule of law which says that a trustee shall not buy trust property from a cestui que trust; but it is a well-known principle of equity that if a transaction of that kind is challenged in proper time, a court of equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the cestui que trust when it was sold."

Thus, in *Dougan v. Macpherson*,² A., who was a trustee and a cestui que trust under his father's will, had a valuation made of the trust estate for his own private purpose, namely, for the purpose of obtaining a loan on the security of his share of the estate. Subsequently he bought the share of his brother, who was also a cestui que trust but not a trustee. When he so bought, A. did not disclose to his brother the valuation. It was held that the sale must be set aside. Lord MACNAGHTEN, after approving the dictum of Lord CAIRNS above cited, says,³ A. "was keeping back information which it was his bounden duty to have conveyed to his cestui que trust. And it does not matter in the least how or under what circumstances the information was gained; if he had that information he was bound to place it at the disposal of his cestui que trust with whom he was dealing."

¹ (1877), 2 App. Cas. 215, at p. 236; 43 Digest 782, 2228.

² [1902] A. C. 197; 43 Digest 783, 2229.

³ At p. 204.

ARTICLE 66.

**Right of Cestui que Trust to follow
the Trust Property.**

(1) As long as trust property remains in substance in the hands of a trustee, however often and however improperly its nature or investment may have been altered by him, and whether it is or is not mixed with the trustee's own money, provided when it is so mixed it can be distinguished from his, the cestui que trust is entitled to claim it as against all the world.

(2) When the trustee mixes the trust property with his own moneys in such a way as to make its identification impossible, the court assumes, if he invests the mixed fund, that he intends the investment to be for the benefit of the cestui que trust, and if he converts any part of such investment or any part of the mixed fund itself to his own use, that he intends so to convert in the first place the part of it which belongs to himself.

(3) Where any part of the trust fund is transferred to a person who is not lawfully entitled to it but who takes it without notice of the breach of trust, the cestui que trust, so long as such part can be distinguished from the transferee's own property, may claim it against the world; but when it cannot be so distinguished he may sue the transferee for the value of it as a debt in equity.

Paragraph (1).

The above rule is usually called the right of a cestui que trust to follow the trust property as long "as it is

earmarked." It used to be added that money is not earmarked. This, the second part of the rule has now made somewhat misleading. It only amounts to this, that it is on the whole harder to discover where money came from than it is with other property. But where it can be distinguished money is just as much within the rule as anything else. No act of a trustee can make trust property part of his estate and therefore liable for his debts, though sometimes his acts make it very difficult to say what part of his estate is and what is not trust property. Where it can be shown that certain moneys are the proceeds of, or certain investments were made with, trust property, the cestui que trust can claim them; where they can be shown to be partly the proceeds of, or partly made with, trust money, the cestui que trust has a lien or charge upon them for the amount of trust money they represent.¹

The rule is stated in the Article as prevailing against all the world, but in fact it is effective only when the trustee is insolvent. When the trustee is not insolvent, then, in case of breach of trust, the cestui que trust's remedy is the proprietary one stated in the next Article or the personal one stated in Article 69.

Paragraph (2).

The leading case on the second part of the rule, and indeed on it all, is *Re Hallett, Knatchbull v. Hallett*.² There a solicitor having in his possession bonds which he knew to be trust property sold the same and paid the proceeds, £2,200, into his private banking account. Subsequently he drew cheques for his own purposes and from time to time paid into his account further sums. When he died there was a balance of about £3,000, but if he had not paid in the other sums

¹ Per JESSEL, M.R., in *Re Hallett's Estate, Knatchbull v. Hallett* (1879), 13 Ch. D. 696, at p. 708; 43 Digest 1021, 4614. See also *Re Outway*, [1903] 2 Ch. 356; 43 Digest 1022, 4618; *Worcester Bank v. Blick* (1882), 22 Ch. D. 255; 43 Digest 771, 2125; *Sinclair v. Brougham*, [1914] A. C. 398; 43 Digest 454, 820.

² *Supra*.

after he paid in the proceeds of the bonds his balance would have been much under £2,200. Now there is a rule called the rule in *Clayton's Case*,¹ under which it is assumed that where a customer draws cheques upon his banker he intends, where there is no arrangement to the contrary, to draw out first the money he first paid in. It was held by the Court of Appeal that this rule did not apply in this case. The customer here was trustee of part of the money, and it must be taken, and were he the defendant he would not be allowed to deny it, that he intended to draw out first his own money.²

The rule in *Clayton's Case*,³ however, applies as between different cestuis que trust claiming against the same account, there being no reason why the trustee should be assumed to have intended to rob one of them more than another.⁴

The rule stated in *Re Hallett* has been carried a step further in the case of *Re Oatway, Hertslet v. Oatway*.⁵ There A. and B. were trustees of certain funds. A loan of £3,000 of such funds was in breach of trust made to B. on the security of a reversionary interest belonging to B. B. afterwards went abroad, giving A. a power of attorney to sell the reversionary interest. A. sold it for £7,000, which he paid into his own account: £3,000 of this was, of course, trust money. A. subsequently bought certain shares for over £2,000 and converted the balance of the £7,000 to his own use in such a way that it was irrecoverable. A. died insolvent. A claim was made that B. as trustee was entitled to a lien on the share bought by A. in respect of the £3,000 trust money. It was held that he was so entitled. When an investment is made out of a mixed fund composed of trust money and the trustee's own money and the rest of the mixed

¹ (1816), 1 Mer. 572; 3 Digest 179, 334; cf. *Deeley v. Lloyds Bank*, [1910] 1 Ch. 648; reversed, [1912] A. C. 756; 21 Digest 343, 1313.

² See also *Banque Belge v. Hambrouck*, [1921] 1 K. B. 321; 3 Digest 168, 9.

³ *Supra*.

⁴ *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433; 43 Digest 1022, 4616.

⁵ [1903] 2 Ch. 356; 43 Digest 1022, 4618.

fund is converted to the trustee's own use, it must be assumed that the part converted was the trustee's own money no matter in what order the drawings upon the mixed fund took place.

But the rule in *Re Hallett* is a rebuttable presumption rather than an irrebuttable rule of law. Thus if the trustee's account at the bank is overdrawn and he pays in trust funds, the banker is entitled to discharge the overdraft out of the first money paid in, unless he has notice at the time that it is trust money.¹ Similarly, if a trustee who has paid trust moneys into his own bank draws out the whole sum standing to his credit, the beneficiaries cannot claim moneys of his own subsequently paid in unless they are proved to have been intended to replace the trust funds.²

Paragraph (3).

This rule is to be read subject to the rule previously stated, that a person taking the legal estate in trust property for value and without notice of the trust, gets a title which is good against the cestui que trust, and the rule to be stated later, that a person taking with notice that he is taking in breach of trust is a constructive trustee.³

The mere transfer of the trust property to a person who takes it innocently, but does not give value for it, vests in such person no title to it in equity, though he takes a good one in law. Accordingly, so long as it is distinguishable it remains in equity the cestui que trust's property. Where it ceased to be distinguishable, an action for its recovery is treated as analogous to an action at common law for money had and received, and is therefore barred by lapse of time in six years after the receipt of the trust money.

¹ *Hancock v. Smith* (1889), 41 Ch. D. 456 ; 43 Digest 1022, 4615. See also *Coleman v. Bucks and Oxon. Union Bank*, [1897] 2 Ch. 243 ; 3 Digest 182, 344.

² *Roscoe v. Winder*, [1915] 1 Ch. 62 ; 3 Digest 185, 359.

³ *Infra*, Art. 85.

Where the person receiving the part of the trust fund to which he is not lawfully entitled is a co-cestui que trust, the money improperly paid to him may sometimes be recoverable after more than six years in an action for the administration of the trust. Thus, if on taking account it is found that he has received more than he was entitled to in the past, and some assets under the trust are still due to him, the court may deduct from such assets the money which had previously been paid to him.¹

ARTICLE 67.

Right of Cestui que Trust to adopt a Breach of Trust.

Where a trustee by improperly selling or improperly investing trust property commits a breach of trust, the cestui que trust or all the cestuis que trust jointly, if *sui juris* and entitled absolutely to the trust property, may elect to adopt the transaction and claim all the profits and benefits resulting from it. If they so adopt it the trustee cannot be made liable for breach of trust. Where all or any of them do not or cannot adopt the transaction, the trustee is chargeable with breach of trust.

Where trustees have made an unauthorised investment they are entitled to resell, and can make a good title without the consent of the cestuis que trust, provided all the cestuis que trust have not elected to adopt the investment,² or provided they are through disability or other

¹ *In re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502; 43 Digest 960, 4002.

² *Patten v. Guardians of Edmonton* (1883), 52 L. J. Ch. 787; 43 Digest 908, 3492.

cause unable to elect.¹ It is usual when trustees resell to make one of the cestuis que trust a party to the sale to show that all the cestuis que trust have not elected to adopt the unauthorised investment, more especially when the investment was in land.²

¹ *Re Jenkins and Randall's Contract*, [1903] 2 Ch. 362 ; 43 Digest 908, 3494.

² As to the liability of a trustee where his cestuis que trust repudiate an unauthorised investment, see *infra*, Art. 70.

A. PRIVATE TRUSTS (*continued*).

CHAPTER 5.

BREACH OF TRUST.

SUMMARY.

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ARTICLE 68.

The Property in respect of which a Trustee is Chargeable.

(1) A cestui que trust can hold a trustee chargeable for breach of trust only in respect of trust property which the trustee himself has actually received or which he might have received but for his wilful default.

(2) The mere joining with his co-trustees in a receipt for the payment or transfer of trust

property actually received, not by him but by his co-trustees, will not in itself render a trustee chargeable in respect of such property.

This is merely a statutory rendering by section 30 of the Trustee Act, 1925,¹ of the previous equitable rule, and makes no material alteration of that rule.

The only point to be explained is as to trustees joining in receipts. The receipt of one co-trustee, unlike that of one co-executor, does not discharge a debtor who is paying over trust money. Now frequently it is difficult or impossible for all the trustees to receive jointly trust property, especially when such property is money. In such cases they may properly permit or delegate one of their number to receive it²; and in order to give the payor a discharge they may join in the receipt given to him acknowledging payment. This is usually called joining for conformity only.

It should be pointed out that allowing a co-trustee to receive trust money does not discharge his co-trustees from their duty to have it, as soon as is reasonably possible, placed under their joint control.³

ARTICLE 69.

Liability of a Trustee for his own and his Agent's Acts.

(1) A cestui que trust is entitled to hold a trustee liable for any loss to the trust property resulting from the trustee's breach of trust, whether such loss arose directly—

- (i) From the act or omission of the trustee himself, or the act or omission of a

¹ 20 Halsbury's Statutes 120.

² *Home v. Pringle* (1841), 8 Cl. & F. 264, at p. 288; 43 Digest 886, 3287.

³ See cases cited in note to next Article.

co-trustee rendered possible by the trustee's breach of trust ;

- (ii) From the act or omission of an agent appointed by the trustee (whether a co-trustee or stranger to the trust), where the duty delegated to such agent was one which could not properly be so delegated ;
- (iii) From the act or omission of an agent appointed by the trustee (whether a co-trustee or stranger to the trust), where the duty delegated was one which might have been properly but was in fact improperly delegated.

(2) A duty which may properly be delegated to an agent is in fact improperly delegated where it is delegated to an agent who is not reasonably fitted (*a*) by character, and (*b*) by calling, properly to perform it ; and a delegation which in fact is proper may become improper where a breach of trust results ; (*c*) from the delegation being continued longer than is reasonably necessary for its proper performance, or (*d*) from the trustee not ascertaining within a reasonable time by personal inquiry whether the duty has been properly performed.

Paragraph (1).

As has already been pointed out (*a*) a duty of a trustee is an obligation to do or to refrain from doing a certain act ; (*b*) a power of a trustee is a duty to use reasonable care, skill, and prudence in doing or refraining from doing a certain act ; (*c*) the failure to perform a duty is a breach of trust ; (*d*) a trustee is not liable for anything but a breach of trust. In other words, if a trustee performs his own duties and exercises his own powers

properly he is liable neither for his own acts nor the acts of his co-trustees or agents. If these propositions are borne in mind, the preceding Article and the following note will be more easily understood.

We have already discussed the duties and powers of a trustee. As we shall see, the trustee's liability for the act of his agent invariably arises out of his own breach of trust. A few examples will show this.

As to (i), the liability of one trustee for his co-trustee's act or omission usually arises through the trustee's failure to perform his first duty—to preserve the trust property. Thus, in *Thompson v. Finch*,¹ A. and B. were trustees. A. permitted B. to receive trust moneys. There was nothing wrong in this, as we have seen in the preceding Article. But A. also permitted B. to invest them on mortgage in B.'s own name. This was clearly a breach of his duty to have all trust investments made in his and B.'s joint names. The mortgage debt proved irrecoverable and B. became bankrupt. It was held that A. was liable.

Mendes v. Guedella,² where his co-trustees permitted one trustee to have access alone to bearer securities, with the result that he converted some of them to his own use; and *Lewis v. Nobbs*,³ where two trustees agreed that they should hold half each of bearer bonds in which they had invested trust money, are similarly cases of breaches of the duty that co-trustees should have these bonds, like money, under their joint control.

As regards (ii), it is hardly necessary to point out that the breach of trust which renders the trustee liable for the acts of his agent is delegating to the agent a duty which he cannot lawfully delegate.⁴

As to (iii), the breach of trust is the failure of the trustee to perform the duty of displaying reasonable skill, care, and prudence in exercising the power to appoint the agent.

¹ (1856), 22 Beav. 316; 43 Digest 1003, 4445.

² (1862), 8 Jur. (n.s.) 878; 43 Digest 987, 4287.

³ (1878) 8 Ch. D. 591; 43 Digest 926, 3643. See also *Re City Equitable Fire Insurance Co.*, [1925] Ch. 407, at p. 524.

⁴ What duties a trustee can lawfully delegate are set out in Art. 50, *supra*.

Paragraph (2).

As we have seen, trustees now have wide powers of delegating to agents; and section 23 of the Trustee Act, 1925,¹ provides that trustees may, instead of acting personally, employ and pay an agent to transact any business or do any act required to be transacted or done in the execution of the trust, and shall not be responsible for the default of any such agent if employed in good faith. But a trustee will not be protected, unless he shows reasonable care in the selection of an agent who is fitted by character and experience to discharge the duties entrusted to him.

In *Re Earl of Litchfield*,² it was held that to delegate the duty of paying dividends to a person whose reputation for honesty was bad was not a proper exercise of a power. In *Re Weall, Andrews v. Weall*,³ it was held that it was not proper to appoint a solicitor to do what was not legal business, namely, the collecting of rent, and the trustees were held liable for the extra expenses thereby caused.

As to the length of time the delegation may be continued, a good illustration is afforded by *Wyman v. Paterson*.⁴ There trustees by their solicitor received money on the payment of a bond, one of the securities of the trust estate. This in itself was a proper proceeding, as we have already seen. They, however, left the money in the possession of the solicitor for six months. Then the solicitor became bankrupt and the trust money was lost. It was held that the trustees were liable, as it was unreasonable to continue the delegation so long. The duty to take reasonable care to see that the duty delegated is performed is illustrated by *Bostock v. Floyer*.⁵ There a trustee properly instructed a solicitor to carry

¹ 20 Halsbury's Statutes 113.

² (1737), 1 Atk. 87; 4 Digest 226, 2120. See also *In re Sheppard, De Brimont v. Harvey*, [1911] 1 Ch. 50; 43 Digest 885, 3280.

³ (1889), 41 Ch. D. 674; 43 Digest 831, 2764.

⁴ [1900] A. C. 271; 43 Digest 885, 3279. See also *Matthews v. Brise* (1843), 6 Beav. 293; affirmed (1845), 15 L. J. Ch. 39; 43 Digest 883, 2258; *Robinson v. Harkin*, [1896] 2 Ch. 415; 43 Digest 882, 3256.

⁵ (1865), L. R. 1 Eq. 26; 43 Digest 888, 3321.

through a mortgage by which certain trust funds were to be invested on security of certain copyhold land. After a time the solicitor forwarded to the trustee a bundle of deeds containing a paper which purported to be a copy of the court roll admitting the trustee. But there was no receipt for the mortgage money, and it was afterwards discovered that there was no court held on the day of the purported surrender. For many years afterwards the interest was regularly paid. On the death of the solicitor it was found that no mortgage had been made and that he had fraudulently converted the cheque to his own use. It was held that as the trustee had not taken care to see within a reasonable time that the mortgage had been made, he was liable.

The loss of the trust property must, however, be due to the negligence of the trustee. Negligence in itself will not make a trustee liable for the loss if diligence on his part would not have prevented it. Thus, in *Shepherd v. Harris*,¹ a trustee (Janvrin) delegated to his co-trustee, who was a stockbroker, the duty of buying inscribed stock on behalf of the trust. It is not usual for a purchaser of inscribed stock to attend personally at the bank to accept the transfer. Janvrin did not so attend, and, after the date when the inscribed stock was supposed to be purchased, was satisfied by the broker trustee's production of what appeared to be a stock certificate for the inscribed stock purchased. As a matter of fact, the broker trustee had not purchased any stock, but had misappropriated the purchase money immediately on receiving it. No inquiries were made by Janvrin until two years later, when the fraud was discovered. It was held that Janvrin was not liable, since, though he was negligent, no diligence on Janvrin's part could have prevented the loss since the trust money was misappropriated immediately after its receipt.

The rule in paragraph (2) is based on specific decisions merely. The real test to decide whether any delegation is a proper one is : is it reasonable ?² Where, however,

¹ [1905] 2 Ch. 310 ; 43 Digest 857, 3043.

² *Speight v. Gaunt* (1884), 9 App. Cas. 1 ; 43 Digest 884, 3273.

the duty is one that can be properly delegated, the burden of showing that the delegation is not reasonable lies on the person impeaching it.¹

ARTICLE 70.

Measure of a Trustee's Liability for Loss Resulting from a Breach of Trust.

(1) Where a trustee is chargeable with breach of trust the cestui que trust is entitled to recover from him the depreciation of the trust property resulting from the breach, and interest or profits upon the trust property involved in the breach, according to the following rules :

(2) As to depreciation :

- (i) Where the breach of trust is the improper sale or investment of trust property, the cestui que trust can claim either for the actual depreciation of the trust property or for the loss to the trust property consequent on the trustee failing to do what he ought to have done.
- (ii) Where the trustee advanced trust money on loan on security of property which in its nature is a security on which he was entitled to advance the trust funds, he will not be liable for any part of the trust money so advanced which may be lost through the depreciation of the property, if before making the loan

¹ *Re Brier* (1884), 26 Ch. D. 238 ; 43 Digest 888, 3322.

he had the property valued by one whom he reasonably believed to be an able practical surveyor, and he advanced on such surveyor's advice not more than two equal third parts of the value as reported to him by such surveyor.

- (iii) Where the breach of trust is an investment of the trust property which is improper because the sum advanced on the security is excessive, the cestui que trust can claim only for the amount by which it is excessive.

(3) As to interest :

- (i) In all cases the cestui que trust can claim interest the rate of which is in the discretion of the Court but is usually 4 per cent. per annum on the amount of the trust property involved in the breach of trust, or in the alternative the interest actually received or which ought to have been received on the property.
- (ii) Where the breach amounted to an attempt on the part of the trustee to appropriate the trust property to his own use or where the trustee used the trust property for his own purposes in trade or speculation, the cestui que trust usually can claim interest at the rate of 5 per cent. per annum, with yearly or half-yearly rests, or in the alternative an account of the profits actually made upon the trust property.

(4) A trustee is not entitled to set off the profits made in one improper transaction

against the losses made in another improper transaction.

(5) Where several trustees are liable for the breach, each of them is liable for the whole loss resulting from it; and they are also all jointly liable.

Paragraph (1).

Where the breach of trust consists in the trustee making an improper investment, if the investment was one not authorised by the settlement or by law, he can either sell, in which case if there is a loss on the transaction he is liable for it, and if there is a profit the cestui que trust takes it; or the trustee can take over the investment himself upon replacing the trust funds.¹ If, however, the investment was authorised and was improper only because he advanced too much money on the security, he seems to have no option to take it over, and it can be realised whether he wishes it or not.²

Where no loss, direct or indirect, arises through a breach of trust, though the court may think the breach justifies the removal of the trustees from the trust, no damages of any kind can be recovered from them. The Court of Chancery never gave damages: it merely made the wrongdoer account for what he received or should have received.

All breaches of trust for which it is sought to hold a trustee liable must be alleged in the statement of claim and proved at the trial. The rule applicable to cases of wilful default, namely, that on proof of one instance of wilful default at the trial, an account will be ordered on the footing of wilful default,³ has no reference to active breaches of trust.⁴

¹ *Fry v. Tapson* (1885), 28 Ch. D. 268; 43 Digest 888, 3216.

² *Re Salmon, Priest v. Uppleby* (1889), 42 Ch. D. 351; 43 Digest 949, 3877; *Re Lake, Ex parte Howe Trustees*, [1903] 1 K. B. 439; 43 Digest 949, 3878.

³ See *infra*, Art. 162.

⁴ *In re Wrightson*, [1908] 1 Ch. 789; 43 Digest 755, 1976. The whole question of the measure of a trustee's liability was discussed in *Att.-Gen. v. Alford* (1855), 4 De G. M. & G. 843; 43 Digest 971, 4109.

Paragraph (2).

This Article expresses the effect of sections 8 and 9 of the Trustee Act, 1925.¹

(i) Thus, in *Re Massingberd, Clark v. Trelawney*,² trustees sold Consols for the purpose of investing the trust money on a contributory mortgage—that is, a mortgage in which the mortgage money is advanced in parts by several lenders—which is an unauthorised security. Subsequently they called in the mortgage and there was no loss on the transaction. But meanwhile the price of Consols had gone up. It was held that since the sale of the Consols for the purpose of investing the proceeds in a contributory mortgage was a breach of trust, the trustees were bound to replace the Consols sold. This was a loss not of the trust property but to the trust property arising through the trustees not doing as they should have done.

In the same way, where the trustees are directed by the trust instrument to invest in some particular security and no other, the trustees may be liable for profits which would have been gained to the trust property if they had obeyed this direction, even though there is no direct loss of the trust property. But since the Trustee Act, 1925,³ now gives a choice of investments and a power to vary investments, except where these powers are expressly excluded by the trust instrument, these cases are not very common now.

(ii) Section 8 of the Trustee Act, 1925,⁴ imposes no obligation on trustees to employ a surveyor to have the property valued. What it does is to provide that if trustees do employ a competent surveyor, and advance only two-thirds of the value as reported by him, and if he advises the advance, they will not be liable, by reason only of the proportion borne by the amount of the

¹ 20 Halsbury's Statutes 101, 103.

² (1890), 63 L. T. 296 ; 43 Digest 950, 3890.

³ 20 Halsbury's Statutes 94.

⁴ 20 Halsbury's Statutes 101.

loan to the value of the property, for any loss subsequently accruing to the trust property.¹

(iii) Formerly, where a trustee advanced too large a sum on a security which would have been in every way a proper investment for a smaller sum, if there was loss the trustee was liable for it all. Now, however, he is liable only for the balance over and above the amount for which it was a proper investment. Thus, A., wishing to advance trust money on the security of Blackacre, retains B., a competent surveyor, to value Blackacre. B. values Blackacre at £9,000. Now on this valuation Blackacre is a proper security for £6,000. Say A. advances £7,000. If on sale Blackacre realises only £5,000, A. will not be liable for the £2,000 lost, but only the £1,000 he advanced over the £6,000.

It is to be remembered that the security must be in every other way than merely in value a proper security before the trustee is entitled to the benefit of the Act, and it lies on the trustee to prove this.²

Paragraph (3).

Thus, in *Re Davis, Davis v. Davis*,³ A. and B. sold certain trust investments to the value of £6,400, and paid the same into the trust account at the L. and W. Bank. The bank only allowed 1½ per cent. on deposits, and there was no proper security to be obtained which would pay more than 3 per cent. A. was member of a firm which had an account at the L. and W. Bank. This account was overdrawn to the extent of £20,000, fully secured, the interest payable being 3½ per cent. A. and B., in good faith, advanced the £6,400 to the firm at 3½ per cent. as a temporary investment until a proper investment could be obtained, and the firm used the money to reduce their overdraft. Afterwards the £6,400

¹ *Palmer v. Emerson*, [1911] 1 Ch. 758; 35 Digest 287, 400. For a consideration of the duties of surveyors and trustees, see *In re Solomon*, [1912] 1 Ch. 261; 35 Digest 294, 471.

² *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536, at p. 541; 43 Digest 994, 4352.

³ [1902] 2 Ch. 314; 43 Digest 973, 4134.

was repaid to the trustees. It was held that the trustees were liable for interest at the rate of 5 per cent. per annum for the period during which it was lent to A.'s firm. FARWELL, J., in delivering judgment, cited the following from the judgment of *Vyse v. Foster*,¹ which, he said, is still a correct statement of the law : " If an executor or trustee make profit by an improper dealing with the assets or the trust fund, that profit he must give up to the trust. If that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business ; or, at the option of the cestui que trust, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent."

Paragraph (5).

In *Edwards v. Hood-Barrs*,² it was held by KEKEWICH, J., that although a co-trustee has paid a part of the loss arising from a breach of trust, the cestui que trust may still prove for the whole loss—i.e., for loss that has ceased to be loss—against the estate of a co-trustee who is insolvent.

ARTICLE 71.

Right to Contribution towards Loss through Breach of Trust as between Co-trustees.

Where as against the cestui que trust several co-trustees are each liable for the whole loss resulting from a breach of trust, as between themselves each is entitled to call on the others

¹ (1872), L. R. 8 Ch. 309, at p. 329 ; 43 Digest 916, 3571.

² [1905] 1 Ch. 20 ; 43 Digest 965, 4050.

to contribute equally towards such loss, even though the moral responsibility of all for the breach is not equal: Provided that:

- (1) Where the breach is fraudulent and all the co-trustees are parties to the fraud, there may be no right of contribution.
- (2) Where one of the trustees is, or subsequently to the breach becomes, himself a cestui que trust [and he receives an exclusive benefit from the breach], his interest in the trust property is, as between the trustees, primarily liable for the loss.
- (3) Where one of the trustees caused the loss either (i) by his personal fraud, or (ii) by his improper advice, he being a person on whose advice the other trustees were entitled to rely, he may be held liable to indemnify his co-trustees.
- (4) As regards the limitation of actions, the right to contribution between co-trustees is a simple contract debt, but the period of limitation does not begin to run until the trustees are made liable for the breach of trust.

Where all the trustees were party to a breach of trust, the liability of each to contribute continues after his death, even though no loss occurred during his life, and even though his personal representatives could not be sued for the loss. Thus, in *Jackson v. Dickinson*,¹ A. and B., trustees, in breach of trust invested trust funds in partly paid-up shares. Some years after A.'s death, B., who had attempted but failed to dispose of the shares, had,

¹ [1903] 1 Ch. 947; 43 Digest 946, 3860.

on the company being wound up, to pay a call of £800 upon them. It was held that A.'s estate was liable to contribute £400 towards this call, although the liquidator could not have sued his personal representatives for it or any part of it.

And where the deceased trustee's estate is insolvent, and in consequence the surviving trustee has to pay all the loss due to the breach, if costs out of the trust estate are given to the surviving trustee and the representatives of the other, the surviving trustee is entitled to a lien on the costs given the other's representatives.¹

Paragraph (1).

This is simply an application of the common law rule that there is no contribution between joint tortfeasors. There is, however, this distinction. The law treats every breach of law as a tort or wrong; equity being a thing of conscience distinguishes between innocent and fraudulent breaches of trust, and limits the rule as to there being no contribution between joint tortfeasors, to trustees who have jointly committed fraudulent breaches of trust. By section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935,² however, it is provided that where damage is suffered by any person as a result of a tort any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage. But in any proceedings for such contribution the amount recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

¹ *Fletcher v. Green* (1864), 33 Beav. 426; 43 Digest 948, 3371.

² 28 Halsbury's Statutes 473.

Paragraph (2).

Thus, in *Chillingworth v. Chambers*,¹ A. and B. were trustees under a will, under which A.'s wife was entitled for her separate use to an undivided fifth share of the trust funds. A. and B. invested in inadequate securities £8,650 of the trust money at the rate of 5 per cent. per annum. These investments were made at four different times. After the first two were made A.'s wife died, and he became entitled to her share. In an administration action the securities were sold, and realised in all £7,070, and thereupon an order was made declaring A. and B. jointly and severally liable for the balance, *i.e.*, £1,580. In the result, all this sum was made good out of A.'s share. A. thereupon claimed that B. should contribute half of the £1,580, or in the alternative half of the loss on the investments made before A. became a cestui que trust through his wife's death. It was held that A. was not entitled to any contribution from B. KAY, L.J., in delivering judgment, said²: "A trustee who, being also a cestui que trust, has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust, must indemnify his co-trustee to the extent of his interest in the trust fund, and not merely to the extent of the benefit which he has received." Neither of the other Lords Justices (LINDLEY and SMITH) limited the rule to cases where the trustee cestui que trust obtained an exclusive benefit.

But the loss must have occurred in connection with the same trust under which the trustee was a cestui que trust. Thus, in *In re Towndrow, Gratton v. Machen*,³ two trusts arose under the same instrument with the same trustees but different cestuis que trust. Under one trust, A., one of the trustees, was also a cestui que trust. A. made default in the other trust. It was held that his share in the first trust could not be appropriated to cover the loss in the second trust.

¹ [1896] 1 Ch. 685; 43 Digest 1012, 4523.

² At p. 707.

³ [1911] 1 Ch. 662; 43 Digest 990, 4321.

bought stock as directed to the value of £1,500. C. never invested the balance, but from 1885, when he received the money, till 1888, he continued to send cheques each half-year in respect of dividends on undelivered stock. After that date nothing was recovered from him in respect of either interest or principal, and eventually he became insolvent. In 1896 A. brought an action against B. to make him liable for the loss. B. denied his liability, and in the alternative claimed contribution from A. A. pleaded the Statute of Limitations and section 8 of the Trustee Act, 1888.¹ It was held that the Statute of Limitations did not begin to run as between the co-trustees until their liability became fixed, *i.e.*, until the claim of the cestuis que trust became, by the judgment of the court, established against the trustees, and that as A. was *in pari delicto* with B., he was liable to contribute.

ARTICLE 72.

Duration of a Trustee's Liability to the Cestui que Trust.

(1) Subject to the exceptions contained in the three succeeding Articles, a trustee's liability to the cestui que trust for loss resulting from breach of trust continues until the cestui que trust's right of action is lost, either—

- (i) through his continued acquiescence in the breach, or
- (ii) by his executing a release of his right of action.

(2) Acquiescence or release bars the action only when—

- (i) the cestui que trust in question is *sui juris*,

¹ Repealed, but, in substance, re-enacted by the Limitation Act, 1939, coming into operation on 1st July, 1940.

- (ii) has full knowledge of the facts, and
 - (iii) is not coerced or unduly influenced in giving his acquiescence or release.
- (3) A cestui que trust who, being *sui juris*, consents to or concurs in a breach of trust, is not entitled to sue the trustee in respect of such breach.

Paragraphs (1) and (2).

It was always a principle of equity that the Statutes of Limitation, neither directly nor by analogy, ran in respect of breaches of express trusts. The court was entitled at any period after the breach to give the cestui que trust relief against the trustee. The reason of this was that a trustee who had converted trust property to his own use, or failed to get in trust property by his own wilful default, or improperly disposed of trust property, could not set up his own breach of trust as a defence against the action of the cestui que trust, and so he was always treated as having still in his possession the trust property which he should have had in his possession.¹ This rule, which is now considerably modified by the Trustee Act, 1888,² does not apply to those constructive trusts which arise not out of any breach of confidence on the part of a person occupying a fiduciary position, but by way of ordinary contract.³

It was also, however, a principle of equity that delay defeats equity, or, as it is sometimes put, *Vigilantibus non dormientibus æquitas subvenit*. If a cestui que trust who is *sui juris* and fully seised of all the facts in connection with a breach of trust, allows a long time to pass without taking action, though his action is not barred, the court will refuse him relief. This principle applies not merely to actions against trustees, but to all equitable actions.

¹ *Hovenden v. Lord Annesley* (1806), 2 Sch. & L. 607; 32 Digest 466, 1313.

² Repealed on this point, but, in substance, re-enacted by the Limitation Act, 1939, coming into operation on 1st July, 1940. See next Article.

³ See Art. 86, *infra*; *North American Land and Timber Company, Limited v. Watkins*, [1904] 1 Ch. 242; 43 Digest 710, 1494.

It and the nature of a binding release will be considered in the section dealing with Estoppel, Acquiescence and Release.

Paragraph (3).

This is merely an application of the common law doctrine, *Volenti non fit injuria*. Where a person consents to an unlawful act he cannot afterwards sue the wrongdoer for it. In *Nail v. Punter*,¹ the husband of a cestui que trust who had a life interest in the trust funds and a power of appointment in remainder, induced the trustees to pay to him part of the trust funds. The cestui que trust sued the trustees for breach of trust. While the action was pending she died, and by her will appointed the trust funds to her husband. He thereupon sued the trustees for breach of trust. The action was dismissed.²

ARTICLE 73.

Limitation of Actions by Cestui que Trust for Breach of Trust.

(1) The Statutes of Limitation are a good defence to an action against a trustee for breach of trust except where the action

- (i) is for fraudulent breach of trust and the trustee who pleads the Statutes was a party to the fraud, or
- (ii) is to recover trust property or its proceeds still retained by the trustee who pleads the Statutes, or
- (iii) is to recover trust property which the trustee who pleads the Statutes received and converted to his own use.

¹ (1833), 5 Sim. 555; 43 Digest 1022, 4433.

² See also *Fletcher v. Collis*, [1905] 2 Ch. 24; 43 Digest 1000, 4420.

(2) The period of limitation is six years, and it begins to run

- (i) as regards actions concerning interests in possession at the date of the breach, from such date ;
- (ii) as regards actions concerning interests in reversion at the date of the breach, from the time such interests vested in possession.

(3) A cestui que trust whose claim is barred by lapse of time is not entitled to any benefit through an action brought by a cestui que trust whose claim is not so barred.

(4) A married woman, even though her interest in the trust property is subject to a restraint on anticipation, is not a person under disability within the Statutes of Limitation for the purposes of this Article.

This is a summary of section 8 of the Trustee Act, 1888—which with section 1 is all that now remains unrepealed of that statute.¹

A judicial trustee is not entitled to the benefit of this section.²

Paragraph (1).

The rule that time does not run in respect of breaches of express trusts was to a certain extent modified previously by section 25 of the Real Property Limitation Act, 1874. By that section money or legacies charged on land and secured by an express trust were to be recoverable only within the same time as if there were not any such trust. This, however, applied only to the remedy against the land, not the personal remedy against the trustee.³

On the other hand, the effect of section 8 of the Trustee Act, 1888,¹ is to take completely out of the rule that time

¹ Repealed, but, in substance, re-enacted after June, 1940, by the Limitation Act, 1939.

² *Re Cornish*, [1896] 1 Q. B. 99 ; 32 Digest 493, 1545.

³ *Banner v. Berridge* (1881), 18 Ch. D. 254 ; 32 Digest 368, 522.

does not run in respect to breaches of express trusts all breaches save those excepted by it. Thus, in *Re Timmis, Nixon v. Smith*,¹ three executors were appointed trustees of A.'s will. The trusts of the will were to convert and invest A.'s estate and pay the income to B. for life and on B.'s death to divide it into four equal parts, one of which was to be settled on C. for life, with remainder to her children, and the other three parts to be taken by the three trustees respectively. On B.'s death the trustees divided the trust estate, but instead of settling C.'s share as directed by the will they paid it over to her absolutely. They kept the three remaining parts. More than six years after C.'s death one of her children brought an action for breach of trust. It was held that as the trustees had taken out of the trust estate no more than they were entitled to take, and as the payment to C. was not fraudulent, they were entitled to the protection given by section 8, and the action was dismissed.² But a trustee who was also an annuitant under the trust and who paid himself his annuity without deducting income tax (as should have been done) was held not to be within section 8.³

In order that a breach of trust may be fraudulent within the section the fraud alleged must be the defendant's. Thus, in *Thorne v. Heard*,⁴ A. was first mortgagee of Blackacre, and B. was second mortgagee. A., in exercise of his power of sale, retained C., a solicitor, to conduct the sale of Blackacre. There was a surplus, of which A. became trustee for B. C., however, fraudulently represented to A. that B. had authorised him to receive such surplus, and A. let him retain it. Thirteen years later C. became bankrupt. It was held that as far as A. was concerned the breach of trust was not fraudulent, nor had A. "retained" the trust money within section 8, and therefore he was entitled to the protection of the statute.

Further, the payment of interest on trust property which has been lost through a fraudulent breach of trust,

¹ [1902] 1 Ch. 176 ; 32 Digest 495, 1568.

² See also *How v. Earl Winterton*, [1896] 2 Ch. 626 ; 43 Digest 770, 2113.

³ *In re Sharp, Ricketts v. Ricketts*, [1906] 1 Ch. 793 ; 43 Digest 968, 4081.

⁴ [1895] A. C. 495 ; 32 Digest 386, 688.

is no acknowledgment of the possession of the trust property by a trustee who was at the time he made such payment unaware that the trust property had been lost, or that a breach of trust had been committed by his co-trustee.¹

Paragraph (2).

Section 8 is limited to actions to recover money to which no other provision of limitations applies. By section 1² executors are to be trustees within the meaning of the Act. Now by section 8 of the Real Property Limitation Act, 1874,³ an action to recover a legacy is not barred till twelve years after the right to receive the legacy arose. Here, accordingly, another period of limitation does apply if the legacy is still in the hands of the executor; but if he has honestly parted with the assets, then he can claim that he comes within the Trustee Act, 1888, and that after the lapse of six years the action against him is barred.⁴

Where the breach consists in the improper investment,⁵ or improper disposal,⁶ of trust moneys, in the absence of fraud time begins to run from the improper transaction, not from the date of the loss.

Paragraph (3).

Thus, A., a trustee for B. for life and then for B.'s children equally, invests the trust funds in a speculative security in 1895. In 1904 the funds are in consequence lost. B. then is barred by the statute from suing A. for the breach in 1895. B.'s children, however, are not barred. If they bring an action for breach of trust A. will be

¹ *In re Fountaine*, [1909] 2 Ch. 382; 32 Digest 497, 1584.

² After June, 1940, Limitation Act, 1939, section 31.

³ 10 Halsbury's Statutes 471. After June, 1940, Limitation Act, 1939, section 20.

⁴ See *In re Richardson*, [1920] 1 Ch. 423; 32 Digest 496, 1569.

⁵ *Re Somerset, Somerset v. Earl Poulett*, [1894] 1 Ch. 231; 32 Digest 496, 1571.

⁶ *Thorne v. Heard*, [1896] A. C. 495; 32 Digest 386, 688. As to the date from which the period begins to run where the claimant's interest was not in possession at the time of the breach, see *In re Alsop*, [1914] 1 Ch. 1; 32 Digest 494, 1555.

compelled to replace the trust funds. But B. will not be entitled to the income, which will belong to A. until B.'s death.¹

Paragraph (4).

Before this enactment a married woman under restraint upon anticipation did not lose her right of action either by lapse of time or release, or even if she herself had induced the trustee to commit the breach.² This enactment allows time to run against her when her interest is in possession, and under the following Article her interest in the trust property may be impounded for the purpose of contributing to the liability of a trustee who, at her instigation, has committed a breach of trust.

ARTICLE 74.

Discretion of Court to Impound the Interest of a Cestui que Trust, Party to a Breach of Trust.

Where a trustee commits a breach of trust at the instigation or request or with the written consent of a cestui que trust, the court may, if it thinks fit, impound the interest of such cestui que trust in the trust property, or any part of it, by way of indemnity to the trustee.

This power applies even where the cestui que trust is a married woman without power of anticipation.

This is a summary of section 62 of the Trustee Act, 1925.

A consent must be in writing to come within this section, but an instigation or request need not be.³

¹ *Collings v. Wade*, [1896] 1 I. R. 340.

² *Fyler v. Fyler* (1841), 3 Beav. 550, at p. 563; 43 Digest 1006, 4467.

³ *Griffith v. Hughes*, [1892] 3 Ch. 105; 43 Digest 1015, 4557.

In order to make the instigation, request, or consent of the cestui que trust an instigation, request, or consent within the section, it must be shown that the cestui que trust knew that the act which he requested or consented to amounted necessarily to a breach of trust.¹ And though there is no rule that the trustees must be deceived or misled by the cestui que trust before the court will impound the interest of the cestui que trust for their indemnification,² still, where the cestui que trust is a married woman restrained from anticipation or is otherwise under a disability, the court will require a strong case to be made out before it will take this course.³

ARTICLE 75.

Discretion of Court to Relieve Trustee liable for Breach of Trust.

If it appears to the court that a trustee who is or may be liable for a breach of trust has acted honestly and reasonably and ought fairly to be excused, the court may relieve him either wholly or partly from personal liability for the breach.

This provision is made by section 61 of the Trustee Act, 1925.

In the words of ROMER, J., in *In re Kay, Mosley v. Kay*,⁴ each case must be dealt with according to its own circumstances. Accordingly, examples of cases that have been held to come within this section are of little use and may prove misleading. One or two points, however, may be laid down on which the court is likely always

¹ *Re Somerset, Somerset v. Earl Poulett, supra.*

² *Bolton v. Currie*, [1895] 1 Ch. 544; 43 Digest 1016, 4561.

³ *Sawyer v. Sawyer* (1885), 28 Ch. D. 595; 43 Digest 1002, 4430. But see also *Molynaux v. Fletcher*, [1898] 1 Q. B. 648; 43 Digest 959, 3989.

⁴ [1897] 2 Ch. 518, at p. 524; 43 Digest 994, 4353.

to lay weight. (1) A trustee is not justified in paying away trust funds after a legal claim has been made by other persons, merely because he is advised the claim will not succeed.¹ (2) A trustee does not act reasonably in allowing his co-trustee to conduct, without inquiry on his part, the business of the trust²; (3) nor in accepting the valuation of property for the purpose of advancing trust money on the security of it, not from a valuer appointed by himself, but from one appointed by the mortgagor³; (4) nor in acting in plain breach of the trust instrument, even though his solicitor advises such a course.⁴ But where the trustee is a layman and the directions in the trust instrument might reasonably mislead him as to his legal duties, he will not be held liable if he acted honestly on a false interpretation of these.⁵

Further, a trustee must, to obtain the protection of the statute, not merely act reasonably and honestly; he must act in such a manner that he ought fairly to be excused. Where a trustee is remunerated for his services the court will be very reluctant to hold that he ought fairly to be excused.⁶

ARTICLE 76.

Criminal Liability of Fraudulent Trustee.

Besides the quasi-criminal liability to be attached and committed to prison for contempt

¹ *In re Kay, Mosley v. Kay*, *supra*.

² *In re Turner, Barker v. Ivimey*, [1897] 1 Ch. 537; 43 Digest 994, 4352.

³ *In re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583; 43 Digest 995, 4364.

⁴ *In re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328; 43 Digest 995, 4366.

⁵ *In re Mackay*, [1911] 1 Ch. 300; 43 Digest 994, 4361. See also *In re Allsop*, [1914] 1 Ch. 1; 43 Digest 996, 4370. In the case of *Holland v. German Property Administration*, [1937] 2 All E. R. 807; Digest Supp., relief was granted to a trustee who had acted in ignorance of law.

⁶ *National Trustees Company of Australasia v. General Finance Company*, [1905] A. C. 373; 43 Digest 994, 4360.

of court on failure to pay into court trust money ordered so to be paid,

- (1) A trustee who, with intent to defraud, converts or appropriates any trust property to his own use, or to any other purpose than the use of the cestui que trust, or destroys any of it, is guilty of a misdemeanor, and is liable on conviction to penal servitude for any term not exceeding seven years.
- (2) No prosecution can be commenced without the sanction of the Attorney-General, or, when that office is vacant, of the Solicitor-General.
- (3) Where civil proceedings have been taken against the trustee, the person who took them cannot commence criminal proceedings against him without the sanction also of the court or judge who heard the civil proceedings or before whom they are pending.

As we have seen, attachment and committal were originally the sole mode of enforcing equitable decrees, and they remain still a very usual way of enforcing judgments of the High Court in equitable matters. The criminal liability indicated in this paragraph is provided by section 21 of the Larceny Act, 1916.¹

¹ 4 Halsbury's Statutes 825.

BOOK I (A) : PART I.

Section I. Declared Trusts (*continued*).

B. CHARITABLE TRUSTS.

SUMMARY.

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ARTICLE 77.

The Meaning of "Charitable Purposes."

Trusts for charitable purposes are :

- (i) trusts for the relief of poverty ;
- (ii) trusts for the advancement of education ;
- (iii) trusts for the advancement of religion ;
and
- (iv) trusts for other purposes beneficial to the community, not falling under any of the preceding heads, and not being for the purposes merely of sport or hospitality.

The above definition of charitable purposes is taken almost verbatim from the judgment of Lord MACNAGHTEN

in *Commissioners of Income Tax v. Pemsel*.¹ Perhaps no better definition is possible. At the same time, the fourth head is very vague. With regard to it it may be laid down that, while no trust can be a charitable trust which may not at least be for the public benefit, yet a trust for the public benefit may not be a charitable trust, and a charitable trust may be one which confers benefits only on certain particular individuals. A case or two will render this proposition clearer.

Thus a trust for the suppression of vivisection is a good charitable trust, because the object which the settlor intended to advance is kindness to animals, which is a good charitable purpose, and this though the court is of opinion that the suppression of vivisection is more likely to be for the disadvantage than for the benefit of the public.²

Again, a trust for the advancement of a purpose which incidentally may be for the public benefit, is not a charitable trust when the primary object of it is sport or the entertainment of persons.³ On the other hand, if the object is charitable the fact that it promotes sport does not render it non-charitable. For instance, where money is left to promote sport or hospitality in connection with a particular school, this is a charitable trust, because the primary purpose of it is the advancement of education.⁴ In the same way a trust for the settlor's poor kindred descendants of A., though it can confer benefits upon particular individuals only, yet is a good charitable trust, since it is for the public benefit that every class of the poor should be provided for.⁵ It may be added that the public to be benefited may be the public of a foreign country. Thus a trust for the poor of a foreign town is a good charity.⁶

These cases will show that the vagueness of the fourth

¹ [1891] A. C. 531, at p. 583; 8 Digest 241, 1.

² *In re Foveaux*, [1895] 2 Ch. 501; 8 Digest 259, 206.

³ *In re Nottage*, [1895] 2 Ch. 649; 8 Digest 265, 266.

⁴ *In re Mariette*, [1915] 2 Ch. 284; 8 Digest 246, 57.

⁵ *Gillam v. Taylor* (1873), L. R. 16 Eq. 581.

⁶ *Freund v. Steward* (1893), 69 L. T. 819; 8 Digest 243, 19.

purpose stated in the Article arises from the nature of the subject-matter.¹

"Poverty," in this definition of charity, means not relative but absolute poverty²; and the fact that the persons to be benefited are the blind, or orphans or widows, is not sufficient to make a trust for their relief charitable; but as a rule in the absence of anything to the contrary the court will construe such trusts as if the word "poor" had been inserted before such words as the word "blind."³

In the same way "education" does not mean academic education merely, but any instruction calculated to improve the people mentally or morally. Thus a trust "for the protection and benefit of animals" is a good charitable trust.⁴ But a trust for animals to be a charity must not be for the benefit of specified animals, which is a good private trust if properly declared.⁵

"Religion" may now be said to include all forms of religion whose principles or practices are not contrary to law. Formerly, when the Christian religion was considered part of the law of England, any gift for the benefit of any opposed religion was void.⁶ But now a gift even to a secular society is good.⁷ Formerly, too, the law as to superstitious uses rendered gifts for such objects as prayers for the dead void, but now, notwithstanding 1 Ed. VI. c. 14,⁸ such gifts are good in England,⁹ as they have long been held to be good in Ireland, where that Act does not apply.¹⁰

There is a definition, or rather an enumeration, of charitable purposes contained in the preamble of 43 Eliz. c. 4, which is repeated in the Mortmain and Charitable

¹ See *In re Good*, [1905] 2 Ch. 60; 8 Digest 258, 197; *In re Sidney*, [1908] 1 Ch. 488; 8 Digest 259, 215.

² *In re Drummond*, [1914] 2 Ch. 90; 8 Digest 244, 28.

³ *Thompson v. Corby* (1860), 27 Beav. 649.

⁴ *In re Wedgwood*, [1915] 1 Ch. 113; 8 Digest 259, 208. See also *In re Foveaux*, *supra*.

⁵ *In re Dean* (1889), 41 Ch. D. 552; 8 Digest 264, 259; *ante*, p. 96.

⁶ See *Da Costa v. De Pass* (1743), 2 Sw. 487a.

⁷ *Bowman v. The Secular Society*, [1917] A. C. 406; 8 Digest 265, 270.

⁸ 6 Halsbury's Statutes 630.

⁹ *Bourne v. Keane*, [1919] A. C. 815; 8 Digest 250, 106.

¹⁰ *O'Hanlon v. Logue*, [1906] 1 I. R. 76.

Uses Act, 1888, section 13.¹ It has, however, never been held to be exhaustive.

ARTICLE 78.

Principles Applicable to Charitable Trusts.

Subject to the limitations contained in the following Articles, the principles applicable to declared private trusts apply equally to charitable trusts.

Thus, omitting certainty as to the objects of the trust, which is dealt with in the next Article, certainty as to the intention to declare a binding trust and certainty as to the property to be bound, are as strictly insisted upon in charitable as in private trusts. Indeed, most failures of charitable trusts arise owing to uncertainty on the latter point. Thus, in *In re Macduff*,² a testator left a legacy in trust for "charitable or philanthropic purposes" in perpetuity. If "or philanthropic" had been omitted the trust would have been good, as the words "charitable purposes" would have then applied to the whole fund and they would have sufficiently defined the objects of the trust. But there are philanthropic objects which are not charitable in the legal sense, and since there was no indication as to what portion of the funds was to be devoted to charitable objects and what portion to philanthropic objects, and since the trust for philanthropic purposes—being a private trust—failed as transgressing the rule against perpetuities,³ and further being a private trust it should but did not satisfy the third certainty—certainty of object—was bad, it was held that the whole trust failed for uncertainty.

On the other hand, a gift to "such charitable *and* philanthropic objects" as the trustees may select is capable of creating a valid charitable trust. Whether

¹ 2 Halsbury's Statutes 392.

² [1896] 2 Ch. 451 ; 8 Digest 296, 731.

³ *Infra*, Art. 80.

or not it does so, however, is a question of construction, and the problem to be decided is whether the word "charitable" can be said to govern the other words used to such an extent that the other words are merely descriptive of the particular kind of charity to which the property is to be devoted.¹

Where the trustee is given a discretion as to the apportionment of the trust fund between charitable and other clearly defined purposes not charitable, the trust will not fail for uncertainty, whether he exercises his discretion or not. If he does not exercise it, the court will; and, on the principle that equality is equity, will divide the trust fund equally between the different objects.² But where the purposes not charitable are not clearly defined the trust must fail notwithstanding the discretion given to the trustee.³

There are elaborate provisions in such enactments as the Charitable Trusts Acts, relating chiefly to the administration of the property of charities, which do not apply to private trusts. These, however, have nothing to do with equitable principles, with which alone this work deals, and so they will be referred to only incidentally.

ARTICLE 79.

Certainty as to the Objects of a Charitable Trust.

(1) To sustain a trust for charitable purposes it is not necessary that the settlor should set out a specific object to be benefited by the

¹ See *In re Best*, [1904] 2 Ch. 354; 8 Digest 297, 744; *In re Sidney*, [1908] 1 Ch. 488; 8 Digest 259, 215; *Att.-Gen. for New Zealand v. Brown*, [1917] A. C. 333; 8 Digest 298, 748; *Houston v. Burns*, [1918] A. C. 337; 8 Digest 297, 739; *In re Bennett*, [1920] 1 Ch. 305; Digest Supp.

² *Salisbury v. Denton* (1857), 2 K. & J. 529.

³ *Att.-Gen. for New Zealand v. Brown*, *supra*.

trust. Whether he does set out a specific object or not, the court will hold that the trust is sufficiently declared if it can gather from the whole trust instrument that in any event the trust property should be applied for charitable purposes. Such an intention is called a *general intention of charity*.

(2) Where a specific object is set out and such object was in existence when the trust instrument was executed but ceased to exist before the trust came into operation or where the object set out was when the trust came into operation incapable of performance, the court will not hold that any general intention of charity is disclosed and the trust will fail.

(3) Where a specific object is set out, if such object was in existence at the date when the trust instrument was executed and also at the date when the trust came into operation but failed afterwards, or if there was no such charitable object in existence at the date when the trust instrument was executed ; or where the settlor merely declares that the trust is for charitable purposes ; the court will infer a general intention of charity, and the trust will be good.

(4) Where the trust instrument discloses a general intention of charity but no specific charitable object is indicated, or the specific charitable object indicated fails or does not exhaust the trust property, then the court will proceed thus : It will itself declare the specific charitable objects for which the trust property, or the surplus of it, is to be held. In so doing, it will, where a specific charitable object not capable of fulfilment or not exhausting the trust

property is indicated, endeavour to carry out this purpose as nearly as is possible. This is called carrying out such purpose *cy-près*.

Paragraph (1).

Two cases may be cited where from the whole circumstances the court gathered a general intention of charity.

In *In re Willis*,¹ a testatrix left the residue of her personal estate after the death of her sister to charitable institutions to be selected by W. within three months after the sister's death. Both the sister and W. predeceased the testatrix. It was held that the trust did not fail as the testatrix had shown an intention to devote the residue to charity and nothing else.

In *In re Welsh Hospital (Netley) Fund*,² funds had been collected for establishing and running a hospital at Netley for sick and wounded Welsh soldiers. After the war the hospital was closed. It was held that there was a general intention to apply the funds for the benefit of sick and wounded Welsh soldiers, and that the court would order a scheme to be arranged for carrying out this object.

Paragraph (2).

Thus where a testator left a legacy to "the rector for the time being" of a Roman Catholic seminary, which ceased to exist before the testator died, it was held that the legacy was in trust for the seminary and lapsed.³ And in *Bute's Trustees v. Bute (Marquis of)*,⁴ a testator left a legacy to build certain churches which were to be conveyed to the Roman Catholic bishops of the places where they were built subject to certain conditions. The bishops, however, declined to accept the churches subject

¹ [1921] 1 Ch. 45; 8 Digest 349, 1431.

² [1921] 1 Ch. 655; 8 Digest 349, 1444.

³ *In re Rymer*, [1895] 1 Ch. 19; 8 Digest 312, 926.

⁴ (1905), 7 F. 49; 8 Digest 320, 1027. See also *In re University of London*, [1909] 2 Ch. 1; 8 Digest 291, 690.

to the conditions. It was held that the legacy lapsed into the residue of the testator's estate, on the ground that the performance of the trust was impossible. But where the settlor's intention is not to benefit a particular institution but to advance the objects such institution was formed to carry out, then the fact that such institution has ceased to exist if another has taken its place to advance the same objects will not cause the trust to fail.¹

Paragraph (3).

Thus a testatrix by her will left a legacy in trust for "the following religious charities." Then followed a blank, in which, no doubt, the testatrix had intended to insert the names of the particular charities to be benefited. It was held that there was a sufficient indication of the object of the trust, and therefore a good charitable trust.² Again, in *In re Huxtable*, *Huxtable v. Crawford*,³ the words of the trust were "for the charitable purposes agreed upon between us." It was held that there was a sufficient declaration of trust, and evidence was admitted to show what the particular trusts were. But of late where the trust is by will and there is only a very vague and general description of the charitable objects and a very wide discretion is given to the trustees to select the actual charities to be benefited, the court has held that the trust fails for uncertainty on the ground that under a will such as this the real disposition of the testator's property is made by the trustees and not by the testator.⁴ But though this is a decision of the House of Lords it can scarcely be taken as establishing any principle and indeed it is of doubtful value.⁵

¹ *In re Magrath*, [1913] 2 Ch. 331 ; 8 Digest 310, 912.

² *Re White*, [1893] 2 Ch. 41 ; 8 Digest 249, 89.

³ [1902] 2 Ch. 793 ; 8 Digest 304, 832 ; cf. *In re Heiley*, [1902] 2 Ch. 866 ; 43 Digest 592, 415.

⁴ See *Grimond v. Grimond*, [1905] A. C. 124 ; 8 Digest 296, 734.

⁵ See *Arnott v. Arnott*, [1906] 1 I. R. 127 ; 8 Digest 305, 1 ; *In re Pardoe*, [1906] 2 Ch. 184 ; 8 Digest 248, 82. But cf. *In re Da Costa*, *Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337 ; 8 Digest 295, 722.

When the trust instrument is a will, questions of difficulty constantly arise as to whether the testator has indicated a general intention of charity, though none is expressed, on failure of his intention of benefiting the specific charity indicated by him. If the specific charity intended to be benefited is a definite institution—e.g., “£1,000 in trust for Dr. B.’s Hospital”—and the institution ceases to exist before the testator dies, then the gift fails absolutely. But where the specific institution survives the testator, but the benefit intended cannot be carried out in precisely the same mode as the testator intended, the court usually implies a general intention of charity, and has the intention of the testator carried out *cy-près*.¹ Where the charitable intention relates not to an existing but to a future institution, such as a soup kitchen to be established in a certain parish,² or a church to be built in a certain district, or to some supposed institution which in fact never existed,³ the court is not inclined to let the difficulty of carrying out, or the improbability that it will ever be possible to carry out, the testator’s intention lead to the failure of the gift.

It should be added that once a trust fund has become devoted to charitable purposes the subsequent failure of such purposes will not put an end to the trust. It will in this case be invariably carried out *cy-près*.⁴

Paragraph (4).

As to what is meant by *cy-près*, three points may be noticed. The first is that the new purpose must be in the nature of the particular purpose intended by the settlor.⁵ The second is that it is only permitted to look at the other charitable objects which the settlor intended to

¹ See *Re Mann, Hardy v. Attorney-General*, [1903] 1 Ch. 232; 8 Digest 257, 182.

² *Biscoe v. Jackson* (1887), 35 Ch. D. 460.

³ *In re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876; 8 Digest 310, 908; *In re Webster, Pearson v. Webster*, [1912] 1 Ch. 107; 8 Digest 310, 916.

⁴ See *Smith v. Kerr*, [1902] 1 Ch. 774; 8 Digest 247, 69; *infra*, p. 229. See also *In re Welsh Hospital (Nelley) Fund*, *supra*, p. 222.

⁵ *Re Prison Charities* (1873), L. R. 16 Eq. 129.

benefit by other gifts contained in the settlement, when it is impossible to carry out any charitable purpose in the nature of that for which he made the particular gift.¹ The third is that where an object is clearly indicated by the settlor which is capable of being carried out, the fact that the court or Charity Commissioners think that a different mode of applying the trust funds would be more beneficial to the community is no ground for disregarding the express intention of the settlor.²

When it is determined that there is a general intention of charity the court orders a scheme to be prepared by, or with the approval of, the Attorney-General. This is subsequently submitted to the court, and, on approval by it, takes the place of the original purposes designed by the settlor. This may be done even where the charity to be benefited is abroad, if the trustees or any of them are within the jurisdiction, more especially if the trust fund is to stay in England.³ The Attorney-General and the trustees of the charitable trust are the only persons who are entitled to settle the scheme for the application of the trust fund. Other persons can intervene only when the scheme is submitted for the confirmation of the court.⁴

ARTICLE 80.

Application of the Rule against Perpetuities to Charitable Trusts.

(1) A determining condition which may not be fulfilled within a life or lives in being and twenty-one years—

¹ *Attorney-General v. Ironmongers' Company* (1840), Cr. & Ph. 208; *Smith v. Kerr*, *infra*, p. 229.

² *In re Weir's Hospital*, [1910] 2 Ch. 124; 8 Digest 343, 1362; cf. *Attorney-General v. Price*, [1912] 1 Ch. 667; 8 Digest 347, 1410. It is difficult to reconcile these two decisions, and the later of them is of doubtful authority.

³ *In re Vagliano* (1906), 75 L. J. Ch. 119; 8 Digest 338, 1278.

⁴ *In re Hyde Park Place Charity*, [1911] 1 Ch. 678; 8 Digest 408, 2440.

- (i) is not bad as being contrary to the rule against perpetuities when it is attached to a trust for a charitable purpose, if the gift over on fulfilment of the condition is for another charitable purpose ;
- (ii) is bad when so attached, if the gift over is not for another charitable purpose, or if the trust to which it is attached is not charitable though the gift over is for a charitable purpose ;

(2) Provided that where a charitable trust is of personalty, and the gift for the charitable purpose is of the income of the trust property merely, then such a determining condition attached to the trust is good, if on the fulfilment of the condition the trust property is only to result back to the settlor or to his personal representatives for the benefit of his residuary legatees or next of kin.

(3) When property is directed to be used by trustees for a charitable purpose, the fact that no limit is placed upon the period of time for which it is so to be used will not make the direction bad as contrary to the rule against perpetuities, and, so long as the property has not passed into the hands of purchasers for value without notice, the trust in favour of the charitable purpose can be enforced.

Paragraph (1).

Thus, in *Re Tyler, Tyler v. Tyler*,¹ a testator bequeathed to the trustees of a charity a sum of money subject to a condition that they kept in repair his family vault in H. cemetery, and on breach of such

¹ [1891] 3 Ch. 252 ; 8 Digest 327, 1100.

condition he directed that the legacy should go to another charity. On a summons to ask the court if the condition was good, it was held that it was. But in *Re Bowen, Lloyd Phillips v. Davis*,¹ another testator left money upon trust to establish and maintain for ever schools in certain parishes, subject to the condition that if the Government should establish a general system of education the trust fund was to fall into his residuary estate which he bequeathed to his three sisters. The Government having established a general system of education, the question arose whether the testator's sisters were entitled to the trust fund. It was held that as the gift over was to individuals and not to a charity it was bad as contrary to the rule against perpetuities. Again, in *Re Lord Stratheden and Campbell, Alt v. Lord Stratheden and Campbell*,² the testator by his will left an annuity out of his residuary estate to be provided for a volunteer corps on the next appointment of a lieutenant-colonel. He made S. his residuary legatee. It was held that the gift was bad, as the interest to which it was attached—the residuary gift to S.—was not charitable and it was conditional upon an event which might not occur within the period allowed by the rule against perpetuities.³

Paragraph (2).

Thus, in *Re Randall, Randall v. Dixon*,⁴ a testatrix bequeathed funds on trust to pay the income to the incumbent of a certain church for the time being so long as he permitted the sittings to be occupied free; in case payment for sittings were ever demanded she directed the funds to fall into the residue of her estate. It was held that as there was no general intention to

¹ [1893] 2 Ch. 491; 8 Digest 327, 1102.

² [1894] 3 Ch. 265; 8 Digest 257, 196.

³ See also *Worthing Corporation v. Heather*, [1906] 2 Ch. 532; 8 Digest 328, 1105; *In re Da Costa, Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337; 8 Digest 295, 722; *Re Peel's Release, infra*.

⁴ (1888), 38 Ch. D. 213; 8 Digest 323, 1054. See also *Re Blunt's Trusts*, [1904] 2 Ch. 767; 8 Digest 323, 1055. Cf. *In re Peel's Release*, [1921] 2 Ch. 218; 8 Digest 328, 1109.

devote the funds to charitable purposes, but merely a gift of the income of the fund so long as a certain condition was observed, and as on failure of this condition the fund was to go where the law would vest it in case the testatrix had made no disposition of it whatever, that disposition was good.

This decision is carefully to be distinguished from *Re Bowen*.¹ In *Re Bowen* the fund itself was given to the charity subject to a gift over on breach of condition. In *Re Randall* the fund was not given, but merely the income of the fund up to the happening of an uncertain event, and then the fund was to lapse into the residue of the testatrix's estate. It is difficult, however, to see much force in the distinction, since the doctrine has always been that a gift of the income of property is a gift of the property itself, or, as was said by the same learned judge who decided *Re Randall*,² "The power of appointing the income or fruit of a fund is, in my opinion equivalent to a power over the tree which produces the fruit."³

Paragraph (3).

It is to be noted that this has nothing to do with gifts over. What is meant is that once property is impressed with a charitable trust, such trust remains binding upon it for ever. If A., for example, left property to trustees in trust to pay the income to his son B. for life, then to B.'s eldest son for life, then to such son's children equally, and then to their children's children equally, and so on for ever, this being a private trust, the trusts after that in favour of B.'s eldest son would be void *ab initio*, although there is no gift over.⁴

But if property be settled on trust for charitable purposes, with no gift over, and there is any default in carrying out the trust, even hundreds of years after

¹ *Supra*.

² NORTH, J.

³ *Re L'Herminier, Mounsey v. Buston*, [1894] 1 Ch. 675, at p. 676.

⁴ *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332; 37 Digest 128, 599.

the settlement, the court will enforce it. A remarkable example of this is the case of *Smith v. Kerr*.¹ There, Clifford's Inn was in 1618 assured to trustees for the purpose that it "shall and may hereafter continue to be employed as an Inn of Chancery for the furtherance of the practisers and students of the Common Law of the Realm." For many years Inns of Chancery—which were preparatory schools of law for the Inns of Court—had ceased their educational functions, and the members of the Society of Clifford's Inn had since then treated the Inn as their private property. In 1901, on action brought, it was held that the property was held on a trust for the advancement of legal education, which trust must be carried out.

It is to be remembered that the Charity Commissioners have large powers to alter the objects, especially of ancient charities—that is, charities which have existed over fifty years—by schemes prepared by them. These schemes, like those approved by the court, should be *cy-près* the original objects of the trust. There is an appeal from the schemes of the commissioners to the court, but the court will not interfere unless the commissioners have violated some rule of law, or have been guilty of some gross oversight which calls for the intervention of the court.²

ARTICLE 81.

Enforcement and Administration of Charitable Trusts.

(1) Charitable trusts, being trusts not for the benefit of individual cestuis que trust but for the benefit of the public, cannot (subject to the provisions of the Charitable Trusts Act) be enforced, except by or through the Attorney-General as representing the King.

¹ [1902] 1 Ch. 774; 8 Digest 247, 69.

² *Re Campden's Charities* (1881), 18 Ch. D. 310.

(2) In the administration of charitable trusts, powers given to the trustees may be exercised by a majority of them contrary to the wishes of the minority.

Paragraph (1).

A private person can now under sections 17 and 19 of the Charitable Trusts Act, 1853,¹ commence proceedings for the enforcement of a charitable trust on obtaining the certificate of the Charity Commissioners.²

Paragraph (2).

When the trustees of a private trust have a power to do or not to do a certain thing such power cannot be exercised unless all the trustees agree to its exercise.³ This is not so when the trust is charitable. There such powers may be exercised by a majority of the trustees without the consent or contrary to the wishes of the minority.⁴

¹ 2 Halsbury's Statutes 325, 326.

² See *Rooke v. Dawson*, [1895] 1 Ch. 480 ; 8 Digest 395, 2176.

³ *Supra*, p. 130.

⁴ *In re Whiteley, Bishop of London v. Whiteley*, [1910] 1 Ch. 600 ; 8 Digest 377, 1882.

BOOK I (A): PART I.

Section II. Presumed Trusts.

SUMMARY.

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ARTICLE 82.

Failure of Express Trust.

Where a settlor transfers property to a trustee and there is, owing to any cause, a total or partial failure to vest the equitable estate in such property in a cestui que trust, or the trusts declared do not exhaust the whole equitable estate, then there is a presumption that in so far as there is such failure or the equitable estate is not exhausted, the settlor intended the property to be held in trust for himself. To such trusts as these the statutory provision that trusts of land must be evidenced in writing has no application.

It is a rule of the common law that in so far as a grantor does not effectively convey his estate to the grantee or grantees it remains in him. The above Article is a mere application of this rule to assurances in equity : in so far as a settlor does not effectively assure his equitable estate to the cestui que trust or cestuis que trust it remains in him. Thus if A. conveys a freehold to B. for life and on B.'s death to B.'s eldest son in fee simple and

B. dies without ever having had a son, the fee simple is still in A. If A. instead had conveyed the freehold to trustees to pay the net rents to B. for life, and on B.'s death to convey it to B.'s eldest son in fee simple, and B. died without ever having had a son, the equitable fee simple would remain in A. But instead of saying this the chancery lawyers say the equitable estate results to A. As a matter of fact it never was out of him, for there never was anybody to take it.¹

This being so, the trusts arising under the rule are rather constructive than presumptive trusts, since they are based less on any presumed intention than on a rule of law. At the same time it is usual to place them among presumed or implied trusts, and, after all, it is no very violent presumption to assume that so far as the settlor had any intention in the matter, he intended, if the persons he wished to benefit did not take the property, it was to remain his.

It is to be remembered, however, that it is only on the failure of *absolute* trusts that there is a resulting trust for the settlor. It is, for instance, a common practice among testators² to leave funds on trust for an unmarried woman with a direction that should she marry they are to be settled on herself and her children. Here the trust for the children is only contingent and on its failure the trust for the woman becomes absolute. The principle is called the rule in *Lassence v. Tierney*.³

So many cases of resulting trusts arising through failure of the objects of the original trust have already been referred to that it is not necessary to give more examples. It should, however, be borne in mind in this connection that by the law of evidence, parol (or oral) evidence is not admissible to vary a written instrument, and accordingly, if on the face of the trust instrument

¹ See *Johns v. James* (1878), 8 Ch. D. 744; 5 Digest 1181, 9542; cf. *Smith v. Cooke*, [1891] A. C. 297; 5 Digest 1085, 8882.

² But the same rule appears to apply also to trusts *inter vivos*; *Doyle v. Crean*, [1905] 1 I. R. 252.

³ (1847), 1 Mac. & G. 552; 43 Digest 643, 790. See also *In re Harrison*, [1918] 2 Ch. 59; 43 Digest 644, 795. Underhill and Strahan's *Interpretation of Wills*, 3rd ed., pp. 227-230.

the trustee is described as a trustee, he cannot give evidence to show the intention was that any of the equitable estate not disposed of under the trust was to belong to him.¹

ARTICLE 83.

Purchases through and Transfers to other Persons.

(1) Where the person purchasing and paying the purchase-money for property, real or personal, has it assured to another, or others, or to himself jointly with another or others, there is a presumption that he intends such other or others to hold it in trust for himself. To such trust the statutory provision that trusts of land must be evidenced in writing does not apply.

(2) The presumption in either case can be rebutted or supported :

(a) By evidence of surrounding circumstances.

The most important evidence of surrounding circumstances consists of evidence showing that the relationship subsisting between the parties at the date of the transaction was such as to impose a legal or quasi-legal obligation on the purchaser to provide for the other person.

(b) By evidence of statements made by the parties.

To prove that a gift was intended, evidence of statements made by the purchaser before, at, or after the purchase or transfer, but evidence

¹ As regards charitable trusts, see Art. 79.

of statements made by the other or others only before or at the purchase, is admissible.

To prove that a trust was intended, evidence of statements made by the other or others before, at, or after the purchase, but evidence of statements made by the purchaser only before or at the purchase, is admissible.

Paragraph (1).

In the leading case of *Dyer v. Dyer*,¹ EYRE, C.B., in giving judgment, says²: "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or *successive*, results to the man who advanced the purchase-money." The rule applies equally to pure personalty.³

The rule is sometimes stated to apply also to transfers of pure personalty to other persons who give no consideration for them. But the correctness of this view of the law is open to considerable doubt.⁴ It certainly does not apply to a transfer of the legal interest in land without consideration,⁵ and the authority which usually is cited in favour of its application to a voluntary transfer of pure personalty seems inadequate. That authority is the case of *Standing v. Bowring*,⁶ in which it was held that if a

¹ (1788), 2 Cox 92; 25 Digest 511, 78.

² At p. 93.

³ *The Venture*, [1908] P. 218; 43 Digest 655, 894; *Re Policy No. 6402 of the Scottish Equitable Life Assurance Co.*, [1902] 1 Ch. 282; 29 Digest 35, 3007. It is doubtful, however, whether the doctrine of presumed trusts was really essential to produce the result reached in the latter case, since the person for whose behoof the policy was taken out never had a legal title; *Re Englebach's Estate*, [1924] 2 Ch. 348; 43 Digest 567, 165.

⁴ See Maitland, *Equity*, p. 413, note; White & Tudor, *Equity Cases*, vol. 2, p. 762.

⁵ *Fookes v. Pascoe* (1875), L. R. 10 Ch. 343; 43 Digest 653, 876.

⁶ (1885), 31 Ch. D. 282; 43 Digest 651, 862.

person transfers stock without consideration into the *joint names of himself and another* there is a presumption that he did not intend a gift. But there is no direct authority for the view that the same result would follow in the case of a voluntary transfer of personalty into the sole name of another.¹ It has been said that a distinction should be drawn between land and pure personalty, on the ground that a trust of land must be evidenced in writing and therefore a presumption of trust cannot arise in the case of a voluntary conveyance of land.² But this distinction is difficult to accept when we bear in mind that section 53 of the Law of Property Act,³ which requires trusts of land to be evidenced in writing, expressly enacts that its provisions do "not affect the creation or operation of resulting, implied or constructive trusts"⁴; and the point must be considered doubtful.

Paragraph (2).

(a) The relationships which impose this obligation are those of father to son⁵ or daughter,⁶ husband to wife,⁷ grandfather to grandchild, the father being dead,⁸ and a person *in loco parentis* to adopted child.⁹ In all these cases the relationship is sufficient *primâ facie* to rebut the presumption. And a rebuttal of the presumption may arise through other circumstances than these.

Though these relationships are in themselves sufficient to rebut the presumption, yet the counter-presumption arising from them may itself be rebutted either by sure evidence of other surrounding circumstances or by direct evidence of intention. Thus the fact that a father who had bought property in an adult son's name himself continued

¹ See *George v. Howard and Bank of England* (1819), 7 Price, at p. 651; 25 Digest 518, 129.

² See *Young v. Peachy* (1741), 2 Atk. 254; 43 Digest 651, 851.

³ 15 Halsbury's Statutes 234.

⁴ See also Statute of Frauds, sects. 7, 8.

⁵ *Crabb v. Crabb* (1834), 1 My. & K. 511; 20 Digest 409, 1451.

⁶ *Clark v. Danvers* (1678), 1 Ch. Cas. 310; 13 Digest 64, 785.

⁷ *Re Eykyn's Trusts* (1877), 6 Ch. D. 115; 27 Digest 164, 1331.

⁸ *Ebrand v. Dancer* (1680), 2 Ch. Cas. 86; 25 Digest 513, 94.

⁹ *Currant v. Jago* (1844), 1 Coll. 261; 25 Digest 514, 99.

to manage it,¹ or the fact that the son was his father's man of business,² is a sufficient circumstance to rebut the rebuttal arising from the blood relationship. In the words of JESSEL, M.R., in *Marshall v. Crutwell*³: "Although a purchase in the name of a wife or child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So, in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust."

(b) This rule depends on the rule of evidence that the declarations of a person in his own interest cannot be admitted to support his claim, but evidence of declarations against his own interest are admissible to rebut it.⁴

ARTICLE 84.

Principles Applicable to Presumptive Trusts.

There being no trust instrument to impose or confer special duties or powers on the owners of the legal estate, presumed trusts must always be simple trusts.

The principles applicable to declared simple trusts apply equally to presumed trusts.

¹ *Stock v. McAvoy* (1872), L. R. 15 Eq. 55; 25 Digest 517, 122.

² *Garrett v. Wilkinson* (1848), 2 De G. & Sm. 244; 25 Digest 517, 123.

³ (1875), L. R. 20 Eq. 328, at p. 329; 27 Digest 164, 1336. See also *Pole v. Pole* (1747), 1 Ves. Sen. 76; 43 Digest 652, 863.

⁴ *Stock v. McAvoy*, *supra*.

BOOK I (A): PART II.

CONSTRUCTIVE TRUSTS.

SUMMARY.

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ARTICLE 85.

When a Stranger to a Declared Trust is a Constructive Trustee of the Trust Property.

Where a stranger to a trust assumes to act as trustee, and in that capacity receives trust property, or where a stranger receives trust property knowing that it is being transferred to him in breach of trust, he is a constructive trustee of such property for the cestui que trust.

A stranger to a trust who, though receiving no part of the trust property, knowingly aids a trustee to commit a fraudulent breach of trust, is chargeable as a constructive trustee of the trust property.

It has already been pointed out that a stranger to the trust who takes trust property without giving value for it gets no better title to it than the trustee had. In this note the liability of other persons having dealings with the trust property or the trustees will be considered.

“Strangers” here includes agents employed by the trustees in connection with the trust estate, such as solicitors, brokers, bankers, etc.

A stranger who assumes to act as a trustee is called a trustee *de son tort*. In order to constitute a person a trustee *de son tort* he must actually receive the trust money or put himself in such a position that he could, if he chose, appropriate it to his own use. For example, in *Re Barney, Barney v. Barney*,¹ a deceased miller's widow was sole trustee of his estate under a trust to convert and invest the proceeds in trust securities, and hold the same in trust for herself for life and then for the deceased's children. The widow, who had assisted the deceased in carrying on his business, finding that to wind it up would greatly decrease the income from his estate, determined to continue it. Two friends agreed to assist her in so doing, and a banking account consisting of trust money was opened, upon which the widow was alone entitled to draw, but the bank was not to honour her cheques unless they were initialled by the two friends. The friends were aware that the carrying on of the business by the widow was a breach of trust. The friends received no remuneration, and there was no suggestion of fraud made against them. They paid many bills with cheques drawn by the widow and initialled by them. Ultimately the business proved a failure, the widow executed an assignment in favour of creditors, and the estate was distributed in payment of the trade debts. The children thereupon brought an action against the two friends, claiming a declaration that they were liable to repay all the money paid to or through them otherwise than for the purposes directed by the testator's will, and

¹ [1892] 2 Ch. 265 ; 43 Digest 553, 19.

that each of them was liable for all the estate of the testator employed in carrying on the business, with profits or interest. It was held that the two friends were not liable, as none of the trust property had ever been in their possession or under their control.

Even where a stranger in the ordinary way of business knowingly receives trust money he is not liable to account unless at the time he received it he not merely knew that it was trust money but had reason to believe that it was being transferred to him in breach of trust.

Thus, in *Thomson v. Clydesdale Bank, Limited*,¹ A., a trustee, sent certain trust shares to B., a stockbroker, to be sold. B. sold the stock and paid the proceeds into his bank. At the time he paid in the proceeds his account was largely overdrawn. The bankers knew that he was a stockbroker, and that this money, being the proceeds of the sale of shares, was probably money belonging to his clients. They nevertheless appropriated it to the liquidation of his overdraft. Subsequently B. became bankrupt. A. claimed that the bank was a constructive trustee of the proceeds of the sale of the shares. It was held that it was not. Though it had reason to believe that the money paid in was clients' money, it had no reason to believe that B. was not entitled to deal with it as he had done.

Once a stranger to the trust receives trust property with notice of the trust, he is liable for it even when through misinterpretation of the terms of the trust he was unaware in fact that the property was trust property. Thus, in *Re Champion, Dudley v. Champion*,² a testator left a cottage and the land occupied with it in trust for A., his wife, for life, and then to his children equally. After execution of his will he bought two other

¹ [1893] A. C. 282; 3 Digest 188, 380. See also *Re Blundell, Blundell v. Blundell* (1889), 40 Ch. D. 370; 43 Digest 712, 1506.

² [1893] 1 Ch. 101; 44 Digest 372, 2068. See also *Soar v. Ashwell*, [1893] 2 Q. B. 390; 43 Digest 552, 13; *Jared v. Clements*, [1903] 1 Ch. 429; 40 Digest 169, 1384.

fields and occupied these with the cottage. On his death A. and B., the testator's heir-at-law, approached C., a solicitor, as to a mortgage upon the two fields. C. was advised by counsel that these two fields were not comprised in the trust devise, and that they belonged to the testator's heir-at-law, B., subject to A.'s dower. C. advanced money on mortgage of the fields. Subsequently he sold them as mortgagee. The children of the testator then claimed the purchase money. It was held that on a true construction of the will the two fields did pass under the trust devise, and that C. was a constructive trustee of the purchase money for the cestuis que trust under the will.

Where the stranger receives the trust money with notice of the trust, but in his dealings with it acts merely as the agent and on the instructions of the trustee, it seems that he is liable only where he deals with it on such instructions as on the face of them must result in a breach of trust.¹

Where, however, the stranger does not receive the trust property, whether he acts as agent or not, he is not liable for breach of trust, even when he advised the breach, unless the breach was fraudulent. Thus, in *Stokes v. Prance*,² a solicitor advised trustees to invest trust money on a contributory mortgage—*i.e.*, a mortgage in which different persons contribute shares of the mortgage money—which was plainly a breach of trust. It was held that though this might render him liable for negligence, it did not make him a constructive trustee.

The whole effect of these cases may be summed up in one sentence of the judgment of Lord SELBORNE, C., in *Barnes v. Addy*³: "Strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove,

¹ *Mara v. Browne*, [1896] 1 Ch. 199; 43 Digest 715, 1534.

² [1898] 1 Ch. 212; 43 Digest 890, 3334.

³ (1874), L. R. 9 Ch. 244; 43 Digest 715, 1538.

unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

In the same way a retired trustee is not liable for a breach of trust committed by the remaining or new trustees unless he retired with the intention of enabling them to commit it.¹

ARTICLE 86.

A Trustee or Agent is a Constructive Trustee of Improper Profits.

Where a trustee or any agent makes a personal benefit or profit in connection with his management of the trust property or the pecuniary affairs of his principal in a way that tends to put his interests in conflict with his duties as trustee or agent, he is a constructive trustee of such profit for his cestui que trust or principal, even though he can show that the interests of his cestui que trust or principal did not in fact suffer through the transaction.

The leading case on this subject, as far as declared trusts are concerned, is *Keech v. Sandford*.² There A. was trustee of a certain leasehold for an infant cestui que trust. Towards the expiration of the lease the trustee applied for a renewal on behalf of the

¹ *Head v. Gould*, [1898] 2 Ch. 250; 43 Digest 667, 988. See also *In re Munton*, [1927] 1 Ch. 262; 43 Digest 883, 3269.

² (1726), Sel. Ca. Ch. 61; 43 Digest 633, 720.

infant, which the freeholder refused on the ground that the infant could not enter into the usual covenants. The trustee then applied for and was granted a renewal on his own account. It was held that he was a constructive trustee for the infant.

Formerly it was thought that this principle extended not merely to trustees but to every one taking an interest in the settled property, such as the tenant for life.¹ But the law has now been reconsidered in *In re Biss*, *Biss v. Biss*.² There A., having a shop held from year to year, died intestate. B., his widow, took out administration. There were three children, one being an infant, and C., an adult child, continued with B. to carry on the business. B. applied to the landlord for a new lease on behalf of A.'s estate. The landlord refused. C. then applied on his own behalf, and the landlord granted the lease. B. then claimed that C. should be declared a trustee of the new lease for her as administratrix of A.'s estate. The court rejected the claim. There is a constructive trust of the new lease only where the person obtaining the renewal occupied a fiduciary position, such as declared or presumptive trustee, executor, administrator, or partner, or mortgagor or mortgagee of the old lease. Where he occupied no such position but had merely a partial interest in the old lease, if he obtains a renewal he holds it for his own benefit, unless (a) the lease was renewable by custom or covenant; or (b) he surrendered a remainder of the old lease when he obtained the new one; or (c) he used some fraud or concealment in obtaining the new lease.³

Trustees themselves are not prohibited from purchasing the freehold reversion on a lease held by them on trust unless the lease is renewable by custom, covenant, or practice.⁴

As to a trustee making personal profit out of his trust, we have already seen that this is contrary to his duty

¹ *James v. Dean* (1808), 15 Ves. 236; 43 Digest 634, 729.

² [1903] 2 Ch. 40; 43 Digest 632, 708.

³ *Per ROMER, L.J., In re Biss, supra.*

⁴ *Bevan v. Webb*, [1905] 1 Ch. 620; 43 Digest 636, 740.

as trustee.¹ It has been held, however, that the rule does not apply to the remuneration of a company director, in a case where directors are required to have qualifying shares and the only shares which he has are held in trust for another. In such a case, it is said, the remuneration does not result from the trust property but from the director's services to the company.²

¹ *Re Thorpe, Vipont v. Radcliffe*, [1891] 2 Ch. 360 ; 43 Digest 638, 763.
Williams v. Barton, [1927] 2 Ch. 9 ; 43 Digest 866, 3117.

² *Re Dover Coalfield*, [1908] 1 Ch. 65 ; 9 Digest 464, 3014.

BOOK I.
EQUITABLE RIGHTS.

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INTRODUCTION TO BOOK I (A).

ARTICLE 87.

Principles governing the Subject-matter of the Division.

Of the subjects dealt with in this division of equitable rights, those discussed in the first three sections were within the exclusive jurisdiction of equity, and therefore are enforceable only by equitable remedies, and the grant of such remedies is controlled solely by equitable principles, but those discussed in the last two sections were largely within the concurrent jurisdiction, and, so far as they were within it, the grant of equitable remedies is controlled by the legal principles controlling the grant of the corresponding legal remedies.

The doctrines of conversion, election, performance, satisfaction and ademption are purely equitable. This, however, is not so with misrepresentation and fraud.

For a long time after the decision of the House of Lords in *Derry v. Peek*¹ it was the custom to hold that the effect of that decision was to put an end to the distinction between fraud and misrepresentation in law and fraud and misrepresentation in equity. The real effect of it, however, was to put an end to what used to be called constructive fraud. What was held in *Derry v. Peek*¹ was that when what was in fact a common law action of deceit was brought the defendant could not be held

¹ (1889), 14 A. C. 337; 35 Digest 27, 185.

liable in equity as if he had been guilty of fraud at common law when in truth he was not guilty. In other words the Lords said, just as they did again in *Colls v. Home and Colonial Stores*,¹ that where an equitable remedy is sought for a common law wrong that remedy cannot be granted till it is proved that a common law wrong has been committed.

The Court of Chancery had forgotten this principle as regards common law fraud just as it had forgotten it as regards common law obstruction of ancient lights. The Chancery judges, deciding on both the law and the facts of the cases before them, had failed to discriminate: because they decided the law on precedent they not infrequently proceeded to decide the facts on precedent too. When a charge of fraud was made, instead of deciding each case on its own merits, they adopted the practice of deciding it by reference to previous decisions. In other words they would say, "In this case I do not think the defendant ever intended to deceive the plaintiff; but we are bound by previous decisions to hold that he is as liable as if he actually had intended to do so." This they called constructive fraud. All that *Derry v. Peek*² decided was that no such thing as constructive fraud was known to the common law; and that accordingly in an action in effect one of deceit at common law no equitable remedy could be given for it.

That case, however, did not decide that there was no such thing as fraud not recognised as such by the common law, but for which equity, acting within its exclusive jurisdiction, would grant an equitable remedy. To constitute fraud at common law there must be the wicked mind; but in equity there has never been keenness in distinguishing between such fraud and mere opportunity for fraud or mere negligence. Thus where a party's interest conflicts with his duty, as in the case of a trustee purchasing trust property from himself, equity will set aside the transaction without evidence of moral fraud. Again, where in the interest of third persons a party to a transaction should take certain precautions, if that party

¹ [1904] A. C. 179; 20 Digest 294, 505.

² (1889), 14 A. C. 337; 35 Digest 27, 185.

through negligence fails to take such precautions equity will treat him as if he had fraudulently refused to take precautions. On this the whole doctrine of constructive notice is based. Again, where fiduciary relations exist between the parties equity imposes on the party in whom trust is placed a duty to take care of the interests of the other party, and any failure to take such care makes him liable in equity as if he were fraudulently negligent. Thus a solicitor is under a fiduciary duty to be careful in advising his client ; and if he is negligent, he is liable in equity as if he had been fraudulent.¹ And where one party is in a position to take advantage of another in entering into a transaction equity insists that he shall make full disclosure of all facts within his knowledge which would influence the weaker party's mind ; and if he fails to do so it will set the transaction aside. It is on this principle that the rules as to trustees purchasing from *cestuis que trust*, contracts *uberrimæ fidei*, etc., are based.²

In none of these cases in order to render the transaction invalid is it necessary to prove moral fraud ; yet it would seem that to this day any of them may be pleaded as fraud in equity.³ It is unfortunate perhaps that what is in fact not fraud should be so called in equity ; but this practice no doubt arose owing to equity at one time disclaiming all right of affecting a legal title except in cases of trust, fraud or accident ; and so being forced, when it wished to give an equitable title precedence of the legal title in cases arising outside trust and accident, to describe the ground of its interference as fraud.

Under the head then of fraud and misrepresentation a great number of matters might be discussed. This, however, is not done here for two reasons. The first is, that many of them have been already dealt with in treating of Notice and Trusts ; another, that in practice many more of them are now not treated as cases of fraud. All that is discussed under the head of " Fraud in Equity " are those cases which approximate to fraud at common law.

¹ *Nocton v. Ashburton*, [1914] A. C. 432 ; 35 Digest 55, 493.

² *Infra*, Art. 107.

³ See *Nocton v. Ashburton*, *supra*.

BOOK I (B).

Section I. Conversion.

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ARTICLE 88.

Modes in which Conversion arises.

Legal realty may in equity become personality or legal personality may in equity become realty :

- (i) Where a trust instrument imperatively directs trust realty to be sold or trust personality to be invested in the purchase of land ;
- (ii) Where a binding contract is made for the sale of land ;
- (iii) Where an order of the court (acting within its jurisdiction) is made for the sale of land ; or
- (iv) Where land has become partnership property.

Where, though conversion has taken place in equity, land has not been in fact changed into money, or money has not been in fact changed into land, the conversion will henceforth be

called *equitable* ; where land has been in fact changed into money, or money has been in fact changed into land, the conversion will henceforth be called *actual* conversion.

It should be noted that equitable conversion extends to more than the notional changing of realty into personalty or of personalty into realty. Thus in the case of wasting and reversionary securities, one kind of personalty—leaseholds or future interests in personalty—is notionally changed into another kind of personalty, viz., trust securities. That conversion is important, since it affects the amount of income which the persons entitled to the property are respectively to receive. But most other conversions which have not the effect of changing realty into personalty or personalty into realty are of little importance, since they do not affect the general characteristics of the property, and especially that very important characteristic, its mode of devolution on the death of the person entitled to it. It is convenient, then, to confine the doctrine of conversion to notional changes of “land into money or money into land,” as the doctrine is briefly and popularly stated.¹

Conversion, in this sense, had a special importance in connection with the devolution of the property of persons who, before 1926, died intestate. On the death of such a person the beneficial interest in his realty devolved on his heir-at-law, whilst the beneficial interest in his personalty passed to his next of kin. If, therefore, there had been an equitable conversion of land into money the land would pass to the next of kin ; and, conversely, money which had been equitably converted into land would pass to the heir-at-law. In relation to intestacy, however, the doctrine of conversion has lost its importance ; because, in connection with deaths occurring after 1925, all distinction between realty and personalty, as regards devolution on intestacy, has been abolished.² But the doctrine

¹ See *Attorney-General v. Hubbuck* (1884), 13 Q. B. D. 275, at p. 289 ; 20 Digest 336, 778.

² Administration of Estates Act, 1925, sects. 33, 45 *et seq.* ; 8 Halsbury's Statutes 324, 345.

of conversion may still be important when a person dies testate. A testator, for instance, may leave his realty to X. and his personalty to Y., and as between X. and Y. the question whether or not a particular part of the estate has been converted in equity is still important. Moreover, conversion is still an important doctrine in connection with the payment of death duties, since the duties on realty and personalty are not the same. Inasmuch, however, as most of the cases cited in the following pages were decided before 1926, the words "heir" and "next of kin" appear frequently in them. The reader must keep in mind the fact that the actual conflicts of interest which some of those cases disclose can never recur, though the principles on which the cases were decided are still as important as ever where any question of conversion arises.

The examples given in the note to Article 13 are examples of conversions arising through express directions in trust instruments and through contracts for the sale of freeholds. Nothing but an imperative direction in a trust instrument to convert will suffice to attach the attributes of realty to personalty or vice versâ.¹ The doctrine depends on the maxim that "equity regards that as done which ought to have been done"; and so there is no conversion unless there is a duty to convert. But such an imperative direction may be sometimes implied at any rate in executory trusts. Thus, if in an executory trust the trustees were directed to have personalty settled on limitations which were applicable only to realty, it might fairly be assumed that this implied that the settlor intended the trust funds to be invested in land.² In the case of an executed trust, however, no imperative direction can be implied and so no conversion can take place even where it is clear that the settlor intended realty to be treated as personalty or vice versâ.³ But where there is

¹ *In re Walker*, [1908] 2 Ch. 705; 20 Digest 340, 826; *Re Twopenny's Settlement*, [1924] 1 Ch. 522; 20 Digest 341, 827.

² *Earlom v. Saunders* (1754), 1 Amb. 240; 20 Digest 351, 897. Compare *Evans v. Ball* (1882), 47 L. T. 165; 20 Digest 350, 891.

³ *In re Aspinall's Settlement*, [1916] 1 Ch. 15; 20 Digest 342, 834; *In re Hughes*, [1916] 1 Ch. 493; 44 Digest 878, 7343; *In re Whitehead*, [1920] 1 Ch. 298; 44 Digest 869, 7249.

an imperative trust to convert, then the fact that the trustees have a discretion to postpone conversion does not prevent the trust property being converted in equity from the moment the trust to convert arises.¹ Even a direction that the trustees are only to convert *at the request* or *with the consent* of some person named in the trust instrument will not necessarily prevent the trust property from being treated by equity as converted immediately. In such a case immediate conversion takes place, if on the construction of the whole instrument it appears that the settlor used the words requiring request or consent, not to fetter or restrict the exercise of the trust, but for the purpose of enforcing an imperative obligation to convert.²

The reason why partnership realty is converted is that where there is no provision to the contrary in the partnership instrument, a partner is not entitled on dissolution of the partnership to any specific part of the partnership property, but merely to have the partnership property sold and to receive his share of the proceeds. The consequence is that equity regards partnership realty as in effect held by the partners on an implied or constructive trust for sale.³

ARTICLE 89.

Times at which Conversion arises.

Equitable conversions arising under trusts to convert take place from the time the trust instruments came into operation; those arising under contracts for the sale of land, from the date when the contract became effective in equity; those arising under an order of sale

¹ *Re Raw, Morris v. Griffiths* (1884), 26 Ch. D. 601; 44 Digest 781, 6391.

² *Re Goswell's Trusts*, [1915] 2 Ch. 106; 20 Digest 350, 885; *Re Ffennell's Settlement*, [1918] 1 Ch. 91; 20 Digest 348, 874.

³ *Waterer v. Waterer* (1873), L. R. 15 Eq. 402; 36 Digest 431, 980; Partnership Act, 1890, sect. 22; 12 Halsbury's Statutes 538.

made by the court, from the time the order was made; and those arising under partnership agreements, from the time the land became substantially involved in the partnership business.

As regards trusts for conversion, whether these will cause a conversion in equity will depend upon the state of affairs when the time for the trust to convert comes into operation. If the state of affairs then necessitates a conversion the conversion will relate back to the time when the trust instrument came into operation. Now it is to be remembered that deeds operate from delivery, while wills operate from the death of the testator. Accordingly, where the trust is declared by deed, then, on failure of the purposes of the trust, the trust property results to the settlor. If he is dead any person who claims to be entitled to it must claim through him. On the other hand, where the trust is declared by will, then, on failure of the purposes of the trust, the trust property results, not to the settlor, but directly to the settlor's residuary devisee or legatee or the persons claiming as on intestacy, as the case may be. The importance of this distinction will appear when we come to consider the devolution of the resulting interests.¹

As regards conversions arising out of contracts for the sale of land, most of the cases turn on contracts by which options are given to purchase which are not exercised until after the death of the vendor. The effect of the decisions is this: the general rule is that, whether the vendor died intestate or testate,² the conversion takes place from the time a binding contract was made by him to sell the estate. Where the contract only creates an option to purchase, then no conversion takes place until the option is exercised. Once, however, that option is exercised it takes effect by virtue of the contract which created it, and the contract becomes a binding contract for the sale of the land, and operates to convert it into

¹ See next Article.

² *In re Isaacs, Isaacs v. Reginald*, [1894] 3 Ch. 506; 20 Digest 357, 957.

personalty from the date of such contract.¹ This rule, which is usually called the rule in *Lawes v. Bennett*,² has long been held to apply as between the persons claiming under the vendor, except when the devise of the property over which the option is given was specific and the will was made or confirmed by codicil *after* the option was given or when the specific devise and the option were substantially contemporaneous.³

The operation of the rule in *Lawes v. Bennett* ⁴ is not affected by the fact that the purchase is not carried through ; it is the exercise of the option which effects the conversion, and the conversion is not undone by the fact that the purchase is not completed.⁵ But an option to purchase the freehold will be unenforceable if it offends the rule against perpetuities,⁶ though it may nevertheless constitute a good personal contract between the parties. If, therefore, an option which is so unenforceable is exercised it will not effect a conversion as between the persons claiming under the lessor.

In *In re Isaacs*, *Isaacs v. Reginall*,⁷ A. being owner in fee simple of a house, leased it in 1880 to B. for A.'s life. The lease contained a provision that for six months after A.'s death B. should have the option of purchasing the house at the price of £750. A. died intestate on January 9th, 1894, and on April 25th, 1894, B. exercised his option to purchase. The question in the action was whether the £750 paid by B. belonged to the plaintiff, who was A.'s heir, or to the defendant, who was his administrator. It was held that it belonged to the latter, as the equitable conversion of the freehold house into

¹ See *In re Marley*, [1915] 2 Ch. 264 ; 20 Digest 355, 942.

² (1785), 1 Cox, 167 ; 20 Digest 338, 807.

³ *Emuss v. Smith* (1848), 2 De G. & Sm. 722 ; 20 Digest 358, 963 ; *Re Pyle*, *Pyle v. Pyle*, [1895] 1 Ch. 724 ; 20 Digest 358, 964 ; *Re Calow*, [1928] Ch. 710 ; Digest Supp.

⁴ *Supra*.

⁵ *Re Blake*, *Gawthorne v. Blake*, [1917] 1 Ch. 18 ; 20 Digest 357, 959.

⁶ *Woodall v. Clifton*, [1905] 2 Ch. 257 ; 37 Digest 81, 211 ; *Worthing Corporation v. Heather*, [1906] 2 Ch. 532 ; 37 Digest 81, 212 ; *Rider v. Ford*, [1923] 1 Ch. 541 ; 31 Digest 69, 2168. The same is not true of an option to renew a lease ; *Muller v. Trafford*, [1901] 1 Ch. 54 ; 31 Digest 83, 2272 ; *Rider v. Ford*, *supra*.

⁷ *Supra*.

money must on the exercise of B.'s option be considered to have taken place, not on April 25th, 1894, but in 1880, when the contract was made which created the option.

The whole of these decisions as to conversion by option are contrary to principle. A power to sell converts only from the time it is exercised, not from the time the trust creating it arose.¹ Why then an option to purchase should have a different effect is hard to say. Moreover, the anomaly is emphasised by the fact that it has been decided that the person, whether residuary or specific devisee or (before 1926) heir, in whom the realty was vested on the death of the person who granted the option, is entitled to the intermediate rents and profits until the date when the option is exercised.² In other words, the property remains realty until the option is exercised, and the person entitled to the realty takes the rents and profits; but, quite illogically, the exercise of the option converts the property as from the death of the grantor of the option so that the person entitled, under his will or intestacy, to the personalty takes the purchase money.

An order of sale rightfully made by the court causes an equitable conversion from the date of the order.³

As regards conversions of land into personalty arising out of partnership agreements, the law as to when property becomes partnership property is now stated in section 20 (1) of the Partnership Act, 1890: "All property, and rights and interests in property, originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement." Where the partnership agreement defines what the partnership property is, no difficulty arises. But where the agreement does not so define the partnership property, questions of much difficulty arise as to whether

¹ *In re Dyson*, [1910] 1 Ch. 750; 20 Digest 347, 861.

² *Re Marlay*, [1915] 2 Ch. 264; 20 Digest 355, 942.

³ *In re Dodson*, [1908] 2 Ch. 638; 20 Digest 361, 997; *Re Pole*, [1924] 1 Ch. 156; 20 Digest 362, 1000.

land has been so used or acquired for partnership purposes as to make it partnership property, and therefore, as between the partners themselves and as between the persons claiming under a deceased partner, personal property.¹

The phrase "substantially involved in the partnership" is one of Lord ELDON's which was adopted by JAMES, L.J., in the leading case of *Waterer v. Waterer*.² Its application is the difficulty. The effect of the cases has been stated thus: "Speaking broadly, when we find property bought with partnership money or brought into the common stock, and credited in the books as part of the capital of one of the partners, or otherwise treated by the partners as part or parcel of the partnership property, the inference is that it is partnership property, and none the less so because the property happens to have been conveyed to or taken in the name of one only of the partners, or that it was originally devised to the partners as co-owners."³

When freehold land becomes partnership property, then on the death of one of the partners the legal estate will "devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section."⁴

Thus, if A., B., and C. are partners, and Blackacre, which is a fee simple and partnership property, is vested in them jointly, on the death of A., leaving B. and C. surviving, the whole legal estate will survive to B. and C. But B. and C. will be trustees of Blackacre as regards A.'s personal representatives to the extent of A.'s share in the partnership assets.

¹ Partnership Act, 1890, sect. 22; 12 Halsbury's Statutes 538.

² (1873), L. R. 15 Eq. 402; 36 Digest 431, 980.

³ Underhill, *Principles of the Law of Partnership*, 5th ed., p. 100. See also the cases there cited.

⁴ Partnership Act, 1890, sect. 20 (2); 12 Halsbury's Statutes 537.

ARTICLE 90.

**Devolution on Failure of Purposes
of Conversion.**

(1) Where the equitable conversion arises under a trust to convert, if the purposes for which the actual conversion was directed wholly or partially fail, the property directed to be converted, whether actually converted or not, results wholly or so far as the purposes have failed, to the persons who would have taken it on failure of such purposes if no conversion had been directed.

(2) If such persons are dead when such failure takes place, then whether the property has been actually converted or not, as between those claiming under such deceased persons the property will result as follows: If the failure of the purposes is total, it will result to those who would have taken if there had been no direction to convert in the trust instrument; if the failure is partial, it will result to those who would have taken if the trust property had always in fact been of the nature into which it was directed to be converted by the trust instrument.

Paragraph (1).

As pointed out already, when the trust instrument is a deed (which operates from its execution), so far as the purposes fail, the trust property results to, or rather remains in, the settlor. If he is living, no question arises. If he is dead, his representatives come within paragraph (2).

When the trust instrument, however, is a will (which operates from the death of the testator), there is no resulting trust to the testator since he is dead; the resulting trust is to his representatives themselves. The

question then arises, when conversion of realty into personalty or of personalty into realty is directed by the will: Who, on failure of the purposes for which the conversion is directed, takes the property to be converted? The answer is just the same: the persons who would be entitled to it if no conversion had been directed. When the will contains a residuary clause difficulties often arise as to whether a conversion is directed for a special object only or for all the purposes of the will. If the court holds that the conversion is for all the purposes of the will, of course a failure of any special purpose will not prevent complete conversion; and so land directed to be sold will go on failure of the special object to the residuary legatee and vice versâ.

This principle was finally decided in the leading case of *Ackroyd v. Smithson*.¹ There a testator gave legacies to A., B., C., and D., and then directed his real and personal property to be sold, and his debts and other legacies to be paid out of the proceeds. The residue of the proceeds he directed to be divided between A., B., C., and D. in the proportion of their legacies. A. and B. predeceased the testator, and their shares and legacies lapsed. The next of kin of the testator thereupon claimed these as personal estate. It was held that so far as the residue undisposed of by the will was constituted of the produce of realty, it belonged to the testator's heir-at-law. The conversion of it into personalty was only for the purposes of the will, and in so far as the purposes of the will failed the heir's right to the realty was not displaced. The only mode in which that right could be displaced was by disposing effectually of the whole realty.

Paragraph (2).

Now, just as what a settlor by deed does not effectually dispose of by the deed remains in him, so what a testator does not effectually dispose of by his will vests at once in the persons entitled on intestacy, and does not wait to vest until events show that he has not effectually disposed

¹ (1780), 1 Bro. C. C. 503; 20 Digest 389, 1268.

of it. Thus, for example, if, before 1926, a testator left Blackacre to A. for life (A. being a bachelor), and on A.'s death to A.'s eldest son in fee simple, in case A. never had an eldest son, then the testator's heir-at-law was entitled in right to the fee simple in remainder, not from A.'s death, but from the testator's death. Accordingly, if the testator's heir died before A., the person who became on A.'s death entitled to Blackacre must claim it as the representative of the heir of the testator and not of his own right. The same rule applied to the rights of the next of kin, and it still applies between residuary devisee and legatee.¹

This being so, when the failure of the purposes for which the conversion has been directed takes place after the death of the settlor, in case the trust is created by deed, or after the death of the residuary devisee or legatee, as the case may be, in case the trust is created by will, any claim made for the trust funds not needed for these purposes must always be made by the legal representative of one of these persons.

This then raises the further question, Which of these persons' representatives—the real or the personal representative—is entitled? It is settled law that where the purposes of the conversion have totally failed, then, as no actual conversion can be necessary to carry out such purposes, the direction is a nullity; and accordingly, whether actual conversion has taken place or not, there is no conversion in equity, and the representatives entitled to take are those who would have taken had there never been any direction to convert.² This is commonly put that, when the purposes wholly fail, land directed to be sold results back as land; and money directed to be invested in land results back as money; no matter what its actual condition may be at the time it results back. On the other hand, if the purposes have only partially failed, then an actual conversion is necessary to carry out such purposes as have not failed, and accordingly, whether actual conversion has taken place or not, there is a conversion in

¹ See *Curteis v. Wormald*, cited below.

² *Smith v. Claxton* (1819), 4 Madd. 492; 20 Digest 384, 1213.

equity, and the representatives entitled to take are those who would have taken had the property been, from the date of the direction to convert, of the nature into which it was directed to be converted.¹ This is commonly put that, when the purposes only partially fail, land directed to be sold results back as money; and money directed to be invested in land results back as land; no matter what its actual condition may be at the time it results back.

Thus, in *Curteis v. Wormald*,² a testator by his will gave life estates to A., B., and C. in his freehold, with remainders to their sons in fee tail, with a remainder in fee simple to D. He then directed his personal estate to be invested in the purchase of freehold lands, and these to be settled to the same uses as he had declared of his own freeholds. In pursuance of this direction the testator's trustees had invested his residuary personalty in land. D. predeceased the testator. A., B., and C. survived him, but all died without issue. At the testator's death X. and Y. were his next of kin. Both X. and Y. had died during the lives of A., B., and C., and F. and G. were now their real representatives, and R. and S. their personal representatives. The question arose whether F. and G. or R. and S. were entitled to the land which now represented the testator's personal estate. It was held that the testator's residuary personal estate had vested in X. and Y. as the testator's next of kin at his death, but that it had vested in them as real estate, and had devolved on F. and G. as their real representatives.

The case of *Re Richerson, Scales v. Heyhoe*,³ is an exact counterpart. Land there was directed to be sold, and on partial failure of the purposes for which conversion was directed, it was held that the land unsold had vested in the settlor's heir, not as land, but as money.

Total failure of the trusts for which conversion is directed arises most frequently under wills, where it is not unusual for all the beneficiaries under the trusts to predecease the

¹ *Re Richerson, Scales v. Heyhoe*, [1892] 1 Ch. 379; 20 Digest 386, 1232.

² (1878), 10 Ch. D. 172; 20 Digest 386, 1236.

³ *Supra*.

testator. It seldom occurs in the case of deeds ; and this and the fact that, when it does occur in the case of deeds, the trust property results to the settlor, has led some writers to say that a deed creating trusts for conversion converts from its execution whether the purposes of the trusts fail or not. But that is not so : they only convert from the time the duty to convert arises, and if such duty never arises, do not convert at all. Thus in *In re Grimthorpe*,¹ a settlor by deed settled land upon trust after the death of himself and his wife to sell and divide the proceeds among their children. There were no children. It was held that the trust for conversion having totally failed no duty to convert had ever arisen ; and that consequently the land resulted back to the settlor as land, and passed under a general devise of his lands.

ARTICLE 91.

Devolution on Actual Conversion, proper and improper.

(1) Where trust property is actually converted properly, then whether the owner is under disability or not, on his death it will devolve according to its nature at that time.

(2) Where it has been actually converted improperly, it will devolve as it would have done had there been no actual conversion.

Paragraph (1).

The leading case is *Steed v. Preece*.² There freeholds were conveyed to trustees to hold in trust for A. and

¹ [1908] 2 Ch. 675 ; 20 Digest 402, 1405. Cf. *In re Ffennell's Settlement*, [1918] 1 Ch. 91 (20 Digest 348, 784), where the trust was to convert and hold the proceeds for the settlor for life so that the duty to convert arose from the moment the deed came into operation. See also *In re Hopkinson*, [1922] 1 Ch. 65 ; 20 Digest 385, 1217.

² (1878), 18 Eq. 192 ; 20 Digest 361, 994.

B. as tenants in common in tail with cross remainders. In a suit for the administration of the trust the court ordered a sale and the payment into court of the purchase money. Half of this was paid to A., who was of full age, and the other half was carried to a separate account of B., who was still an infant. B. died unmarried before attaining twenty-one. A. thereupon executed a disentailing deed and claimed B.'s share of the purchase money. It was held that as the order of the court had been consented to by A., and also as it still stood unreversed, it was a good order, and, this being so, the freeholds were properly converted and were now personalty, and that they consequently devolved on B.'s personal representative. JESSEL, M.R., said: "All that *Ackroyd v. Smithson* decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the court or a trustee sell more than is necessary there is an equity to reconvert the surplus for the benefit of the heir at law of the persons entitled at the time of the sale."¹

As stated in the Article, the rule in *Steed v. Preece* applies to sales by trustees or mortgagees where such sales were in the proper execution of their powers.²

Paragraph (2).

This is simply the rule that the improper act of trustees cannot alter in equity the nature of the trust property. If they improperly sell land or improperly invest in land,

¹ This rule has now been approved by the Court of Appeal; *Burgess v. Booth*, [1908] 2 Ch. 648; 20 Digest 388, 1255; *Re Pole*, [1924] 1 Ch. 156; 20 Digest 362, 1000. In some cases, however, statutory provisions exclude the rule. See *Hopkinson v. Richardson*, [1913] 1 Ch. 284; 20 Digest 364, 1019; *In re Alston*, [1917] 2 Ch. 226; 20 Digest 502, 2323. It may also be modified by the terms of the order for sale; *Herbert v. Herbert*, [1912] 2 Ch. 268; 20 Digest 361, 999; *In re Searle*, [1912] 2 Ch. 365; 20 Digest 363, 1008.

² *In re Grange*, [1907] 1 Ch. 313; 20 Digest 365, 1022.

the cestui que trust and those who claim through him can either reprobate or approbate the transaction.

ARTICLE 92.

Election to take Converted Property in its actual State.

Where a person is entitled absolutely to equitably converted property he may elect to take it as converted or in its actual state. His election to take it in its actual state may be shown by his having in fact accepted a transfer of it in that state or by conduct indicating that he does not wish to have its actual state altered. The party who alleges such election is under the burden of proving it.

When the cestui que trust takes the trust property in its actual state from the trustees it is commonly said to be "at home," and however short a period it may be at home amounts to an acceptance of it in its actual condition.¹

As for election to take it in its actual condition otherwise than by accepting it from the trustees, all that is necessary is for the person or persons absolutely entitled to show in any way their intention to take it in that condition.² And if the person entitled to elect dealt with the property in its actual state for a considerable time as if he did not desire to have its nature altered, this will be evidence of an election to take in that state.³ But where a person who is entitled absolutely to realty converted in equity into personalty merely leaves by his will all his realty to a devisee, that is not sufficient to show

¹ *Chandler v. Pocock* (1881), 16 Ch. D. 648; 20 Digest 371, 1095.

² *In re Grimthorpe*, [1908] 1 Ch. 668. Approved by C. A., [1908] 2 Ch. 675; 20 Digest 402, 1405.

³ *Re Gordon* (1877), 6 Ch. D. 531; 20 Digest 399, 1375.

that he had elected to take the converted property as realty.¹ If the absolute title is vested in more than one person, all interested must join in the election, but they need not be aware that the effect of their election will be to alter the course of devolution of the trust property.² A person absolutely entitled in contingency may elect, and when the contingency happens, the property will be bound by his election.³ The election does not take effect, however, until the contingency happens, because until then his interest in the property is not absolute.⁴

¹ *In re Ffennell's Settlement*, [1918] 1 Ch. 91 ; 20 Digest 348, 874.

² *Harcourt v. Seymour* (1851), 2 Sim. (N.S.) 12 ; 20 Digest 391, 1291.

³ *Re Duke of Cleveland's Settled Estates*, [1893] 3 Ch. 244 ; 20 Digest 372, 1096. Cf. *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296 ; 20 Digest 397, 1364.

⁴ *Re Sturt*, [1922] 1 Ch. 417 ; Digest Supp.

BOOK I (B).

Section II. Election.

SUMMARY.

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ARTICLE 93.

The Doctrine of Election.

Where by the same instrument a gift of property is made to a donee and a gift of the donee's own property is made to a third person, the court will put the donee to his election either to take the gift made to him and transfer his own property to the third person or to retain his own property and out of the property given to him make compensation for it to the third person ; Provided :

(i) That the property given to the donee is property of which the donor, and

(ii) That the property of the donee given to the third person is property of which the donee,

were each entitled freely to dispose.

The principle here stated is what is known as the *equitable doctrine of election*. The ground upon which it is based is thus explained by CHITTY, J., in the leading case of *Re Lord Chesham, Cavendish v. Dacre*¹ :

¹ (1886), 31 Ch. D. 466, at p. 473 ; 20 Digest 423, 1535. See also *Gretton v. Howard* (1818), 1 Sw. 410 ; 20 Digest 422, 1521.

“The principle on which the doctrine of election is based is that a man shall not be allowed to approbate and reprobate; that if he approbates he shall do all in his power to confirm the instrument which he approbates. . . . If a man approbates, his obligation is confined to his adopting the instrument as a whole and abandoning every right inconsistent with it.” If he reprobates, his obligation is confined to making compensation out of the gift made by the instrument to him to the person to whom his property is given by the instrument. It follows from this that in order to give rise to election there must in the first place be property of another person given to the donee out of which he can make compensation in case he reprobates the instrument, and in the second place, property of the donee, which he can transfer in case he approbates the instrument, must be given to a third person.¹

Taking this general statement of the law, it will be seen that the principle of compensation, in case the donee reprobates or takes against the instrument, distinguishes equitable election from the election a cestui que trust is said to make when he adopts or repudiates an unauthorised investment. There if the cestui que trust adopts the investment he loses all right to complain of the breach of trust; and if he repudiates the investment he loses all right of claiming the unauthorised investment. Again, the same thing distinguishes equitable election from a conditional gift. Where a gift is made to A. of one property on condition he gives another belonging to him to B., if A. refuses to give his property to B., A. has no right whatever to the property given to himself, since he has not performed the condition precedent subject to which it was given.

The same thing may be said to distinguish equitable election from a principle with which it is often confused, that is confirmation of voidable instruments. Instruments void *ab initio* cannot be confirmed.² All that is meant by confirmation is that by the act or omission of the

¹ See *In re Booth, Booth v. Robinson*, [1906] 2 Ch. 321; 20 Digest 424, 1547.

² *Harle v. Jarman*, [1895] 2 Ch. 419; 20 Digest 448, 1730.

person who was able to make the instrument absolutely void, it has ceased to be voidable and is binding on all parties. Thus the contract of an infant is not void if it be for his benefit, but he is entitled if he likes to repudiate it on coming of age. If he does not repudiate it within a reasonable time after he comes of age, this will be held a confirmation of it.¹ Now if A., an infant bride, enters into a marriage settlement under which B., the husband, settles property for her benefit and she covenants to settle all property subsequently acquired by her on the trusts of the settlement, this covenant will be voidable only. If then A., after attaining full age, does not repudiate it within a reasonable time, the trustees of the settlement will be entitled to claim her after-acquired property, and she will have no option in the matter.² If, however, A.'s covenant to settle had been absolutely void *ab initio*, then, without repudiating it on coming of age, she could claim to retain any after-acquired property accruing to her. If she did so a true case of election would arise. Then the court would say if A. claims her after-acquired property contrary to the settlement she must not also retain the benefits she receives under the settlement, but must make compensation out of these to those persons who are damaged by her action.³

Next, as to the two essential conditions necessary to raise election, namely, that the donor must give property to the donee and the donee's property must be given to a third person. Not merely must the donor give property, but he must give property of a kind which will constitute it a free benefaction to the donee: otherwise the donee receives nothing out of which he is under any obligation to recompense the third person in case he insists on keeping his own property which the donor has attempted to give away. Thus if A. has a special power to appoint

¹ *Edwards v. Carter*, [1893] A. C. 360; 28 Digest 158, 181.

² *Viditz v. O'Hagan*, [1900] 2 Ch. 87; 28 Digest 211, 703.

³ *Re Vardon's Trusts* (1885), 31 Ch. D. 275; 28 Digest 208, 679; *Carter v. Silber*, [1891] 3 Ch. 553; 20 Digest 422, 1529 (reversed on another point, [1892] 2 Ch. 278; 28 Digest 158, 181). See also *Codrington v. Codrington* (1875), L. R. 7 H. L. 854; 20 Digest 406, 1433.

£10,000 among his children, who are to take in default of appointment, and he appoints £9,000 among them and £1,000 to B., who is a stranger to the power, the children will be under no obligation to elect between taking the £9,000 and transferring the £1,000 to B. and repudiating the appointment altogether.¹ The appointment to B. simply fails for the benefit of the children. It would, however, have been different if A. had left, say, Blackacre—his own property—among the children. Then the children would have to elect either to confirm the appointment to B. or make B. compensation for not doing so, to the value, at any rate, of Blackacre.² Again, if A., a landowner in a country where the law does not permit the devise of land, devised his land to B. and C., then whether the heirs of A., who on his death became the owners of his foreign lands, would be entitled to claim such lands without making any compensation to B. and C. would depend on whether A. has by his will left other property of his own to such heirs. If he has, they must compensate or give the lands to B. and C.; if he has not, there is no fund out of which B. and C. can claim compensation.³ This rule applies to all gifts, whether under special trusts or not, which fail: the persons entitled on failure must elect between confirming any gift given them or the gift which has failed—even though the result of the election may be to benefit, not the object of the donor's bounty, but merely that person's residuary legatee.⁴ But it seems it does not apply where the will purports to exercise a power and the appointment fails because it is contrary to law—for example, as being void under the rule against perpetuities,⁵ or where the will fails to be effective through neglect of the necessary formalities—for example, where a foreign will not executed so as to pass English realty purports to devise land in England.⁶

¹ *Bristowe v. Ward* (1794), 2 Ves. Jun. 336; 20 Digest 343, 1517. Cf. *Wollaston v. King* (1869), L. R. 8 Eq. 165; 20 Digest 404, 1418.

² *Whistler v. Webster* (1794), 2 Ves. Jun. 366; 20 Digest 426, 1564.

³ *In re Ogilvie*, [1918] 1 Ch. 492; 20 Digest 423, 1532.

⁴ *Re Brooksbank* (1886), 34 Ch. D. 160; 20 Digest 407, 1436.

⁵ *In re Nash*, [1910] 1 Ch. 1; 20 Digest 432, 1608.

⁶ *In re de Virte*, [1915] 1 Ch. 920; 11 Digest 376, 545.

The second essential condition to raise election, is that not merely must the donee's property be given to a third person, but the property so given must be property which the donee is able to transfer to the third person. Otherwise, if he chooses to take under the instrument there is nothing which he can give up. Thus, in *Re Lord Chesham, Cavendish v. Dacre*,¹ a testator left certain chattels in trust for his two sons and his residuary estate to the eldest son. Now, the chattels left to the two sons were in fact heirlooms, or, more correctly, chattels settled to accompany the family mansion, of which the eldest son was only tenant for life. The eldest son, therefore, could not transfer any of them to his brother. It was held that in consequence he could not be put to his election either to transfer them or to recompense his brother for not doing so out of the residuary estate.

Election was formerly confined to gifts by will. It now, however, applies also to gifts under settlements both *ante*- and *post*-nuptial. It arises only where the two gifts are contained in the same instrument; but for this purpose a marriage settlement, though contained in more than one document, is regarded as a single instrument.²

When the election arises under a will, the rights of the parties become fixed at the testator's death: when under a deed, when the party to elect is in the enjoyment of both properties and is competent to elect. Accordingly, if election does not take place until some time after these periods and before then a change has taken place in the parties' positions, the court will disregard this change.³

¹ (1886), 31 Ch. D. 466; 20 Digest 423, 1535.

² *Codrington v. Codrington*, *supra*.

³ *Re Hancock, Hancock v. Pearson*, [1905] 1 Ch. 16; 20 Digest 424, 1540.

ARTICLE 94.

How far Doctrine is based on Intention.

In order that the doctrine of election may apply, it is not necessary to show that the donor intended to put the donee to his election; but if it appears that he did *not* intend to put the donee to his election, it does not apply.

Where the donee is a married woman, the fact that the gift to her is made subject to a restraint upon anticipation prevents her making compensation if she elects against the gift and so she cannot be put to her election at all.

Election is not based upon any actual intention on the part of the donor. It is based simply on the rule of construction that the maker of an instrument presumably intends that all parts of it should be carried into effect. Accordingly—at any rate, in a will—it is immaterial whether the donor knew that the property he gives to the third person is the donee's or not.¹ It is, however, necessary that the testator should clearly intend to give the property away whether he knows it is the donee's or not. This is important, since in the case of wills the presumption is that the testator intends to give away only what is his own property, and so if there is any ambiguity as to the property intended to be given, the court will hold it was not his intention to give away the donee's property.²

But though election is not based upon any actual intention on the part of the donor, still the indication by the donor of an intention that the donee shall not be put to his election excludes it. Such an intention is seldom or never stated in so many words, and where it is so stated no difficulty arises. The difficulty arises where the court

¹ *Cooper v. Cooper* (1874), L. R. 53; 20 Digest 404, 1419.

² *Wintour v. Clifton* (1856), De G. M. & G. 641; 20 Digest 410, 1455.

has to gather the actual intention from the form in which the gift to the donee is made. It has been held, for instance, that where the gift is to a married woman, and is made without power of anticipation, this is sufficient to indicate that the donor did not intend her to elect, since an election to keep her own property and make compensation for it out of the gift would have the effect of doing away with the restraint which the donor intended should affect the gift to her.¹ It is doubtful, however, whether the presumed intention of the donor is a satisfactory explanation of the fact that no case for election by the married woman arises. If from the mere fact of the restraint being annexed to the gift we are to infer that the donor did not intend the married woman to elect, we ought to hold logically that there is no case for election where the donee is a spinster and the donor attempts to attach a restraint on anticipation to the gift which he makes to her. It is true that a valid restraint cannot be attached to the property of a spinster, but it would be possible to argue, nevertheless, that the fact that the donor attempted to attach a restraint to such a gift showed that he did not intend the spinster to part with the property given, as she might do if she were called upon to elect. Yet it is now settled that where a restraint is annexed to a gift made to a spinster or a widow and the donor gives away property belonging to the spinster or widow a case for election does arise.² It would seem, therefore, that the better explanation of why the married woman is not called upon to elect is because if she elected to retain her own property she could not make compensation out of the property given to her.³

¹ *Re Vardon's Trusts*, *supra*. See also *Haynes v. Foster*, [1901] 1 Ch. 361; 20 Digest 426, 1552.

² *In re Tongue*, [1915] 1 Ch. 390; 20 Digest 426, 1553; *In re Hargrove*, [1915] 1 Ch. 398; 20 Digest 426, 1554.

³ *Per* JESSEL, M.R., in *Smith v. Lucas* (1881), 18 Ch. D. 531; 20 Digest 424, 1549.

BOOK I (B).

Section III. Performance, Satisfaction, and Ademption.

SUMMARY.

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ARTICLE 95.

Definitions of Performance, Satisfaction, and Ademption.

For the purposes of this sub-section—

Performance means a transfer of property which, whether the donee wishes it or not, operates in law as a complete or *pro tanto* discharge of a previous legal liability of the donor ;

Satisfaction means a transfer of property which, if the donee accepts it, operates in law as a complete or *pro tanto* discharge of a previous legal liability of the donor ; and

Ademption means a transfer of property

operates in law as a complete or *pro tanto* substitution for a gift previously made by the donor's will, and unrevoked at his death.

Thus A. covenants on his marriage to purchase and settle lands to the value of £10,000 on his wife B. He purchases lands to the value of £5,000, and so settles them. This is *performance* in part of his liability under the covenant, and B. has no option but to accept it as such.

Again, A. covenants on the marriage of his son X. to give him £10,000. By his will A. leaves to X. one-third part of his residuary estate. This is a *satisfaction* of A.'s liability under the covenant if X. accepts it. But X. is under no obligation to accept the share of the residue as a discharge of A.'s estate. He can insist on receiving out of such estate the £10,000, the amount A. covenanted to pay him.

Again, A. by his will leaves his daughter Y. one-third of his residuary estate. Subsequently, on Y.'s marriage, he gives her £10,000. A. dies without having altered or revoked his will. The £10,000 is an *ademption* complete or *pro tanto* of the gift of one-third of A.'s residuary estate. Y. has no option in the matter. If she claims anything under the will, she must bring into account the £10,000 she received upon her marriage as part of what she is entitled to receive under A.'s will.

Formerly it was thought that in cases of satisfaction and ademption the donee's acceptance of the second gift constituted a complete forfeiture of his right under the covenant or will. It is now settled, however, that this is so only where the second gift is of a value equal to or greater than the value of such right. Where it is of less value it works a forfeiture only to the extent of its value.¹

¹ *Pym v. Lockyer* (1851), 5 My. & G. 29; 20 Digest 453, 1769; *Re Pollock, Pollock v. Worrall* (1885), 28 Ch. D. 552; 20 Digest 469, 1947.

ARTICLE 96.

Presumption as to Performance.

(1) Where a person covenants for valuable consideration to purchase and settle lands upon certain trusts, and subsequently purchases lands of the nature of those covenanted to be purchased and settled, equity, if he retains such lands unsettled till his death, will presume that such lands were purchased in performance of the covenant and are bound by it.

(2) Where a person covenants for valuable consideration that he will leave by will a legacy or a proportionate part of his personalty, or that his executors shall pay a certain sum or annuity, to a certain person, and subsequently dies intestate, or by his will leaves a different sum or annuity to such person, equity will presume that any share of the covenantor's estate received by such person under the intestacy or the different sum or annuity left by his will is a complete or *pro tanto* performance of the covenant.

Paragraph (1).

A covenant for value to purchase and settle lands generally creates simply a specialty debt. It does not create a specific lien or charge upon lands purchased in pursuance of it and not settled. Formerly, when a testator's lands were answerable only for specialty debts in which the heir was bound, and all specialty debts were payable out of personalty in preference to simple contract debts, the doctrine of performance, as stated in the Article, had an importance it does not now possess. A covenant to purchase and settle *specific* lands, on the other hand, probably does create a lien on such lands when purchased and not settled.

The doctrine, however, is now useful chiefly to prevent descendants claiming what in effect are double portions. A good example of its operation in this way is the case of *Wilcocks v. Wilcocks*.¹ There A., in consideration of marriage, covenanted to purchase and settle lands of the value of £200 a year on his wife for life, and the first and other sons of the marriage in tail. He purchased lands of this value but did not settle them. He died intestate. A.'s eldest son succeeded as heir to the lands purchased. He brought an action to have the covenant to purchase and settle lands enforced, but it was held that the lands descended to him constituted a performance of the covenant.

If the covenant is to purchase freehold lands, it is not performed by the purchase of leaseholds, but a smaller purchase of lands of the kind to be settled is *pro tanto* a performance of the covenant.² And a purchase of lands by the covenantor without consulting the trustee is a performance of a covenant to purchase with the consent of the trustees,³ or of a covenant to pay money to trustees to be expended in the purchase, with the covenantor's consent, of lands to be settled.⁴ And where lands are purchased in performance of a covenant to settle, they will be bound by it if they descend on intestacy⁵; or if the covenantor mortgages them, the equity of redemption will be bound.⁶

Paragraph (2).

In *Goldsmid v. Goldsmid*,⁷ a testator who, under his marriage articles, had covenanted that if he died in the lifetime of his wife his executors would, within three months of his decease, pay her £3,000, died in his wife's lifetime. By his will he left all his property to his

¹ (1706), 2 Vern. 558; 20 Digest 494, 2245.

² *Lechmere v. Earl of Carlisle* (1735), 3 P. Wms. 228; 20 Digest 337, 7934.

³ *Ibid.*

⁴ *Sowden v. Sowden* (1785), 1 Bro. C. C. 582; 20 Digest 494, 2238.

⁵ *Denton v. Davies* (1812), 18 Ves. 499.

⁶ *Ex parte Poole* (1847), 1 De G. 581; 20 Digest 495, 2258.

⁷ (1818), 1 Swanst. 211; 20 Digest 449, 1745.

executors, with a direction to pay his debts, and, at the expiration of three years from his decease, distribute the residue of his estate in such way as seemed to them right. The executors all either predeceased the testator or renounced, and the residue became consequently divisible under the Statute of Distributions.

It was held that the rule stated in this paragraph (called usually the rule in *Blandy v. Widmore*¹) applied to this partial intestacy as much as to a complete intestacy, and that the widow's distributive share of the residue was a performance of the covenant.

On the same principle where a man on his marriage covenanted that if his wife should survive him his executors should make up her income under the settlement to £1,000 a year and he died before his wife and left all the income of his residuary estate to her for life, it was held that such income was to be taken as a performance of the covenant.²

The rule does not apply where the liability is a liability arising during the lifetime of the covenantor—such as where the covenant is to settle a sum two years after marriage, and the settlor lives over two years and does not make the settlement. Here, on breach of the covenant, the obligation becomes a debt, and must, like other debts, be paid before the intestate's estate is distributed under the statute.³ Nor does it apply where the liability undertaken cannot be covered by the payment of a gross sum—*e.g.*, where the covenant is to pay the covenantee an annuity for life.⁴

A covenant to leave a legacy or a specific proportion or the whole of the covenantor's estate to certain persons creates no lien on the estate. The covenantor is perfectly entitled to deal freely with his property during his lifetime, the liability affecting his estate only after his death.

¹ (1716), 1 P. Wms. 323; 20 Digest 497, 2280.

² *In re Hall*, [1918] 1 Ch. 562; 20 Digest 486, 2121.

³ *Oliver v. Brickland* (1732), 3 Atk. 420 n.; *Garthshore v. Chalie* (1804), 10 Ves. 1; 20 Digest 497, 2283.

⁴ *Salisbury v. Salisbury* (1848), 6 Hare, 526; 20 Digest 498, 2291.

ARTICLE 97.

Satisfaction of Debts.

Where a testator having contracted a debt before the date of his will dies without having paid it, and by his will leaves his creditor a pecuniary legacy equal to or greater than the amount of the debt, and in every other respect as advantageous to the creditor as the debt was, equity, in the absence of anything to show a contrary intention, will presume that the testator intended the legacy to be in satisfaction of the debt.

The rule here stated was first established in 1714 by the decision in *Sir John Talbot v. Duke of Shrewsbury*.¹ "No sooner," in the words of STIRLING, J., in *Re Horlock, Calham v. Smith*,² "was it invented than learned judges of great eminence expressed their disapproval of it, and invented ways to get out of it." This was because it was felt that to establish a general presumption that every legacy left by a debtor to a creditor is intended to be in payment of the debt is carrying much too far the sensible doctrine that a debtor is not presumed to give (*Debitor non præsumitur donare*).

The chief ways invented by the judges to get out of it were these: In the first place, they held that no satisfaction of a debt *pro tanto* could be presumed. The legacy must be either equal to or greater than the debt, or the creditor could claim both debt and legacy.³ In the second place, a legacy could not be presumed to be in satisfaction of a debt which had no existence when the will was made.⁴ In the third place, to raise the presumption it must be clear that the legacy is at least as advantageous

¹ (1714), Prec. Ch. 394; 20 Digest 480, 2041.

² [1895] 1 Ch. 516; 20 Digest 479, 2037.

³ *Eastwood v. Finke* (1731), 2 P. Wms. 613; 20 Digest 482, 2079; *Graham v. Graham* (1791), 1 Ves. 272; 20 Digest 482, 2081.

⁴ *Thomas v. Bennet* (1725), 2 P. Wms. 341; 44 Digest 395, 2283.

to the creditor as the debt was. This condition strictly applied would almost have disposed of the rule, since debts are payable immediately, and legacies, unless otherwise directed by the will, cannot as a rule be recovered till twelve months after the testator's death; and, indeed, whether an immediate debt can be satisfied by an ordinary legacy, when no time for payment of the legacy is specified, is doubtful. In 1895, STIRLING, J., held that there was no satisfaction in such a case, because the difference in time of payment was a disadvantage.¹ But in a later case,² SWINFEN EADY, J., held that there was satisfaction, even though the debt carried interest. It is difficult to reconcile the two cases. The later case probably would be followed, and it can be justified on the ground that where a legacy is in satisfaction of a debt and no time is fixed for payment of the legacy, the legacy carries interest from the death of the testator,³ so that even where the debt itself carries interest the legacy is at least as beneficial as the debt. On the other hand, if a time for payment of the legacy is specified, or if the legacy is residuary,⁴ no question of interest from the testator's death can arise, and whether or not it is less advantageous than the debt must depend on other considerations. Other disadvantages arise where the legacy is contingent, or uncertain or less easily recoverable, as where the debt is secured by bond or negotiable instrument.⁵ In the fourth place, it was held that the fact that the will contains a direction to pay debts, or to pay debts and legacies, is a sufficient indication of the testator's intention that the legacy is not to be taken as a satisfaction of the debt.⁶

Despite these exceptions, however, the rule stated in the Article operates, and a legacy to a creditor of an amount equal to or greater than the debt is *prima facie* considered to be a satisfaction of the debt. The excep-

¹ *Re Horlock, Calham v. Smith*, *supra*.

² *In re Rattenberry*, [1906] 1 Ch. 667; 20 Digest 483, 2092.

³ *Clark v. Sewell*, 3 Atk. 96, at p. 98; 20 Digest 483, 2087.

⁴ See *In re Greg*, [1921] 2 Ch. 243; 23 Digest 41, 167.

⁵ *Chancey's Case* (1717), 1 P. Wms. 408; 20 Digest 484, 2102.

⁶ *Chancey's Case*, *supra*; *Re Huish, Bradshaw v. Huish* (1889), 43 Ch. D. 260; 20 Digest 485, 2109.

tions indicated above are wide, but the ground on which they exclude the operation of the rule is that they are taken to indicate a contrary intention on the part of the testator¹; and the doctrine applies unless on the facts it is clear that the testator did not intend the legacy to be taken in satisfaction of the debt. Thus, in *Re Fletcher, Gillings v. Fletcher*,² a husband owed his wife £625. Subsequently to incurring this debt he made his will and left a legacy to his wife of £625. Before he died, he repaid the £625 debt. It was held that the legacy was intended in satisfaction of the debt, and the debt having been paid by the testator in his lifetime, the legacy was thereby adeemed.

The rule stated in the Article applies equally where the debtor is the father of the creditor, provided the debt is not created by the father by way of portion for the child.

ARTICLE 98.

Ademption of Legacies.

Where a legacy appears on the face of a will to be bequeathed for a particular purpose (not being a portion within the next Article), and a subsequent gift appears to have been made for the same purpose, a presumption arises that the second gift was intended to adeem the legacy either completely or in part.

This is adapted from the language of Lord SELBORNE, L.C., in *In re Pollock, Pollock v. Worrall*.³ He proceeds thus: "To constitute a particular purpose within the

¹ *Per* ASTBURY, J., in *Re Hall*, [1918] 1 Ch. 562, 567; 20 Digest 486, 2121.

² (1888), 38 Ch. D. 373; 20 Digest 430, 2045; see also *Atkinson v. Littlewood* (1874), L. R. 18 Eq. 595; 20 Digest 437, 2146.

³ (1885), 28 Ch. D. 552, 556; 20 Digest 469, 1947.

meaning of that doctrine it is not, in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage, or the like), should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist."

The case of *In re Pollock, Pollock v. Worrall*¹ is itself a good example of this expressed moral duty. There a widow by her will left £500 to her husband's niece, "according to the wish of my late beloved husband." Afterwards she asked the niece whether she would prefer a smaller sum down to a larger sum on the widow's death. The niece expressed a preference for a smaller sum down, and the widow gave her £300. On the widow's death, the legacy of £500 was held to be adeemed to the extent of £300.

It should be noticed particularly that the widow expressed in the will the moral obligation—namely, the wish of her late husband—which she intended to fulfil. The same result follows if any particular purpose is expressed as the purpose for which the legacy is bequeathed and the subsequent gift appears to have been made for the same purpose. Thus, a testator left £10,000 to the trustees of "the endowment of the C. Hospital," and later he wrote to those trustees sending a cheque for £10,000 and saying that he wished to redeem a promise to give that amount to the endowment fund. It was held that the gift adeemed the legacy.² In the same way there was held to be ademption where a gift by will was made to strangers for the purpose of making up their incomes to a certain figure and subsequent gifts for the

¹ *Supra*.

² *Re Corbett, Corbett v. Lord Cobham*, [1903] 2 Ch. 326; 20 Digest 457, 1816.

same purpose were made by the testator in his lifetime.¹ It is, however, essential that the moral obligation or the particular purpose should appear on the face of the will, and it is not sufficient that it is revealed by extrinsic evidence. Thus, where a gift was made by will to a trustee for the benefit of an infant and subsequently a gift *inter vivos* of the same sum was made to the trustee for the infant's benefit, it was held that there was no ademption, because there is "no authority . . . to show that a mere legacy to A., in trust for the benefit of B., . . . is a legacy for a particular purpose."² There must be in the will an indication not merely of the beneficiary but of the particular purpose for which the gift is made.

Sometimes a legacy is said to be adeemed by a subsequent legacy. Strictly speaking this is altogether incorrect. When two legacies of the same amount are given to the same person in the same will, the question arising is, whether or not the testator was in both cases referring to the same legacy or to different legacies. It will be presumed that he was referring merely to the same legacy if the two legacies are of equal amount and given to the same person, and by the same will or same codicil, or, if by separate instruments, they are, in addition, expressed to be given from the same motive.

It should be noted that a *donatio mortis causâ* is not adeemed by a subsequent legacy of the same value as the *donatio*. Thus, in *Hudson v. Spencer*,³ A. in his last illness gave B. as a *donatio* scrip representing securities of a certain value. Subsequently he made his will by which he left B. a legacy of the same value. It was held that B. was entitled to both the securities and the legacy.

¹ *Re Jupp*, [1922] 2 Ch. 359; 20 Digest 457, 1812. See also *Re Aynsley*, [1915] 1 Ch. 172; 20 Digest 471, 1975; *Re Eardley's Will*, [1920] 1 Ch. 397; 20 Digest 450, 1753.

² *In re Smythies, Weyman v. Smythies*, [1903] 1 Ch. 259; 20 Digest 457, 1815.

³ [1910] 2 Ch. 285; 20 Digest 456, 1808.

ARTICLE 99.

Definition of "Portion."

(1) By *portion* is meant a gift made by a father of his own property, or of settled property over which he has a power of appointment among his children, to or for the benefit of a lawful child for the purpose of discharging the moral obligation of the father to provide for the child.

(2) *Primâ facie* all gifts by will to a child, all settlements made on a child on marriage, all moneys expended in establishing a child in a profession or business, and all considerable lump sums given without a specific purpose to a child are portions. Sums, however, given to a child for the payment of his debts, and small gifts made to a child from time to time without a specific purpose, are not to be regarded as portions, but rather as temporary assistance, unless it appears that the father intended them to be regarded as portions.

(3) A person who shows that he has taken upon himself towards a person who is not his child the moral obligation of a father, is said to be a person *in loco parentis* to such person. Gifts, which if made by a father would be portions, are portions if made by a person *in loco parentis* to the donee.

(4) A mother, as mother, is not under the moral obligation of a father to provide for her child, and *primâ facie* no gifts by her to the child are portions. Neither is a grandfather under the obligation as regards his grandchildren.

(5) Portions given to a child during his father's life are called *advancements*.

Paragraphs (1) and (2).

In *Taylor v. Taylor*,¹ JESSEL, M.R., thus describes what is to be considered a portion: "I have always understood that an advancement by way of portion is something given by a parent to establish the child in life, or to make what is called a provision for him. . . . If in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him; but if a small sum is so given you may require evidence to show the purpose. . . . Not every payment is a provision for the child; and I think that Wood, V.-C., referred to that when he said, in *Boyd v. Boyd*,² that the sum must be paid for a particular purpose; by which I understand him to mean a special purpose with a view to the establishment of the child in life." And the money may be either the father's own property or property settled to provide for his family over which he has a special power of appointment.³

As examples of portions, JESSEL, M.R., in *Taylor v. Taylor*,⁴ gives these among others: a marriage settlement, payments for putting a son into a business or profession, buying for him the goodwill and stock-in-trade of a business.

It is to be noted that in order that a provision by a father for his child should be a portion, the child must be his lawful child. An illegitimate child is in law *nullius filius*, and so a stranger to the father. This often causes the rule against double portions, which we shall next discuss, to work out very unfairly as between legitimate and illegitimate children of the same father.⁵

¹ (1875), L. R. 20 Eq. 155, at p. 157; 20 Digest 458, 1825. See also *Re Scott*, [1903] 1 Ch. 1; 20 Digest 459, 1840.

² (1867), L. R. 4 Eq. 305; 20 Digest 458, 1827.

³ *In re Shields*, [1912] 1 Ch. 591; 20 Digest 452, 1768.

⁴ *Supra*.

⁵ *Ex parte Pye* (1811), 18 Ves. 140; 20 Digest 463, 1836.

Paragraph (3).

In order that a person may be *in loco parentis* for the purpose of this and the following Article, it is necessary to show that he intended to assume the duty of a lawful father to provide for the child. "The offices and duties of a parent are," says Lord COTTENHAM, in *Powys v. Mansfield*,¹ "infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child. . . . The rule, both as applied to a father and to one *in loco parentis*, is founded on the presumed intention. . . . The having so acted towards a child as to raise a moral obligation to provide for it affords a strong inference in favour of the fact of the assumption of the character; and the child having a father with whom it resides, and by whom it is maintained, affords some inference against it; but neither are (*sic*) conclusive."

Paragraph (4).

A mother is not under the same moral obligation as a father to provide for her children, and therefore gifts by her to them are *primâ facie* not portions.² But, like any other person, she may assume the obligations of a father, in which case the rule applicable to persons *in loco parentis* will apply to her.³ A grandfather is in the same position as regards grandchildren.⁴

Paragraph (5).

An advancement usually means giving property to the child, and especially money. But it also includes entering

¹ (1837), 3 My. & Cr. 359, at p. 366; 20 Digest 493, 2224.

² *Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574; 20 Digest 461, 1873.

³ *Ibid.*

⁴ *In re Dawson*, [1919] 1 Ch. 102; 20 Digest 462, 1879.

into a liability to give him money or money's worth. Thus a covenant to settle a sum of money is an advancement which, if the child claims performance of it against his father's estate, is equivalent to the advance of the money itself.¹

ARTICLE 100.

Satisfaction and Ademption of Portions.

(1) Where a portion is given to a child by will and subsequently an advancement by gift or covenant is made to the same child, or where an advancement by covenant (but not by gift) is made to a child, and subsequently a portion is given to the same child by will, there is a presumption that the portion, in the first case, is adeemed by the advancement, and the advancement, in the second case, is satisfied by the portion either wholly or *pro tanto*, as the case may be.

(2) This presumption will be rebutted if the portion by will and the advancement differ substantially—

- (i) in the nature of the property given ;
- (ii) in the nature of the limitation of the gifts ;
- (iii) in the nature of the conditions affecting the gifts.

Paragraph (1).

The rule here stated is what is called the presumption against double portions. Whatever may have been the original reason for raising this presumption (and probably it was to prevent too many portions being

¹ *Cooper v. Macdonald* (1873), L. R. 16 Eq. 258 ; 20 Digest 469, 1949.

fixed upon the father's lands in the hands of his heir), it is now useful—if useful at all—chiefly for preventing one child being favoured at the expense of the others. An example or two will illustrate the rule.

Thus, in *Montagu v. Earl of Sandwich*,¹ Lord S. by deed charged his estates with an annuity of £1,000 in favour of his second son. Subsequently he devised, subject to all charges, the estates to his eldest son. He also bequeathed to his second son personalty of a value of more than £1,000 per annum. It was held that the bequest was a satisfaction of the charge of £1,000 upon the real estate.

Again, in *Hopwood v. Hopwood*,² a testator bequeathed a legacy to one of his children. Subsequently, on the marriage of this child, he settled certain moneys on her. After this advancement he added a codicil to his will, but did not alter the legacy to the child advanced. It was held, nevertheless, that the advancement made was an ademption of the legacy.

Again, in *McCarogher v. Whieldon*,³ a father covenanted on his son's marriage to settle a certain sum upon him and his wife and children. Subsequently, the father by his will left a legacy to the son. It was held that this legacy was a satisfaction of the covenants as far as the son was concerned, although it was not a satisfaction as regarded the wife and children.

A covenant to settle may in the same way constitute an ademption of a portion given previously by the father's will.⁴

Where the residuary estate is divided between the children of the testator and a stranger, then if one of the children is subsequently advanced, this advancement will not be brought into account so as to benefit the stranger. The stranger will first receive his share of the residue, and then when the child who has been advanced claims a share of what remains he will have to bring the advance-

¹ (1896), 32 Ch. D. 525; 20 Digest 476, 2018. See also *In re Lawes* (1881), 20 Ch. D. 81; 20 Digest 471, 1979.

² (1859), 7 H. L. Cas. 728; 20 Digest 451, 1758.

³ (1866), L. R. 3 Eq. 236; 20 Digest 467, 1937. Cf. *Lord Chichester v. Coventry* (1867), L. R. 2 H. L. 71; 20 Digest 449, 1744.

⁴ *Cooper v. Macdonald* (1873) L. R. 16 Eq. 258; 20 Digest 469, 1949.

ment into hotchpot in favour of the other children.¹ If a legacy not residuary given to a child is adeemed, then all the residuary legatees, whether children or strangers, share the benefit: but if the child receiving the legacy is also one of the residuary legatees the strangers will not be allowed to benefit by the ademption of the legacy.²

A direction in the will that the testator's debts are to be paid will not prevent an advancement by covenant being satisfied by a legacy.³

Paragraph (2).

The differences which will rebut the presumption that a second portion was intended to satisfy or adeem a previous portion must be such as to make it either—(i) a gift of a different thing; (ii) a gift to substantially different persons; or (iii) a gift subject to substantially different conditions. It should be noted that smaller differences will suffice to rebut the presumption of satisfaction than are necessary to rebut the presumption of ademption.⁴

As to differences in the nature of the property, the gift of land *inter vivos* will not adeem a legacy of money. The thing given to be a satisfaction must be *ejusdem generis* with the gift which it is to satisfy.⁵

In the same way the gift of a share in the father's business may adeem a legacy, but it would seem that this is the case only when the share of the business was fixed at a money value when the gift was made.⁶

As to other differences, they may be illustrated by

¹ *Meinhertzen v. Walters* (1872), L. R. 7 Ch. 670; 20 Digest 455, 1785.

² *In re Heather, Pumfrey v. Fryer*, [1906] 2 Ch. 230; 20 Digest 455, 1786.

³ *Cooper v. Macdonald*, *supra*.

⁴ *Tussaud v. Tussaud* (1878), 9 Ch. D. 363; 20 Digest 475, 2016.

⁵ *Re Jacques, Hodgson v. Braisby*, [1903] 1 Ch. 267; 20 Digest 472, 1782.

⁶ *Re Lawes* (1881), 20 Ch. D. 81; 20 Digest 471, 1779. See also *Re Vickers* (1888), 37 Ch. D. 81; 20 Digest 472, 1981; *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482; 20 Digest 453, 1770.

Tussaud v. Tussaud.¹ There T., on the marriage of his daughter W., covenanted that his executors would settle within six months of T.'s death £2,000, to be held in trust for W.'s appointees, and in default of and until appointment for W. for life for her separate use, then for her husband for life, and on the death of the survivor for the children of the marriage. During his life T. handed £1,000 to the trustees of the settlement, which was a performance in part of the covenant. On his death, he left £2,800 to the trustees in trust for W. for life for her separate use without power of anticipation, then for her children who attained twenty-one years, and in default of such children for T.'s sons. It was held that this was no satisfaction of his covenant, and that the trustees were entitled to recover the £1,000 covenanted to be settled from T.'s executors, and at the same time retain the legacy of £2,800.

A covenant, however, to settle a portion on a child and her family may be satisfied as to the child's life interest by a legacy to her absolutely. Thus, in *In re Blundell* ² a father on his daughter's marriage covenanted to pay the trustees of her settlement a certain sum to be settled on the daughter for life, then on the husband for life, and then on the children of the marriage absolutely. He afterwards lent the daughter £3,000 and by his will he left her absolutely a third of his residuary estate, she to bring the £3,000 lent into hotchpot. Her settlement contained a covenant to settle after-acquired property, and her share of residue exceeded the sum covenanted to be settled. It was held that the legacy to the daughter was a satisfaction of the covenant only as regarded her life interest, since her husband and children did not take directly any share in it.³

¹ *Supra*. See also *Re Furness*, [1901] 2 Ch. 346; 20 Digest 478, 2029.

² [1906] 2 Ch. 222; 20 Digest 474, 2009.

³ See also *McCarogher v. Whieldon* (1866), L. R. 3 Eq. 236; 20 Digest 467, 1937.

ARTICLE 101.

Admission of Parol Evidence.

Where any question of performance, satisfaction, or ademption arises, the court will, as to the admission of parol evidence, proceed upon the following rules :

- (1) Where both transactions are contained in written instruments, if the court, on construing such instruments—
 - (a) holds that the second transaction was not a performance, satisfaction, or ademption of the earlier liability or gift, it will not admit parol evidence of the donor's actual intention ;
 - (b) holds that there is a presumption that the second transaction was intended as a performance, satisfaction, or ademption of the earlier liability or gift, it will admit all relevant parol evidence of the donor's actual intention to rebut or support such presumption.
- (2) Where one of the transactions is not contained in a written instrument, the court will admit all relevant parol evidence to show the donor's actual intention in entering into that transaction.

This is the rule as laid down by Sir EDWARD SUGDEN (Lord St. Leonards) in *Hall v. Hill*.¹ It is simply an application of the general principle that where on the construction of written instruments the court presumes a

¹ (1841), 1 Dr. & War. 132 ; 20 Digest 484, p.

meaning not expressed in the documents, it will admit parol evidence to rebut such presumption, and where it admits evidence to rebut it will also admit evidence to support it.

The rule against double portions is merely a presumption as to the intention of the father. Where parol evidence is admitted, and this shows that the father did not, in fact, intend a portion or advancement to be adeemed or satisfied by a subsequent advancement or portion, then the rule has no application.¹

The evidence most relevant is evidence of the declarations made by the father at the time the gifts were made.²

It may be noted that a letter left by a testator declaring his intention that a gift made to a legatee during the testator's life was intended to adeem the legacy is not admissible as evidence of such intention after the testator's death if during his life it was not communicated to the legatee (or, *semble*, otherwise published). Thus, in *In re Shields, Corbould-Ellis v. Dales*,³ a testator left by will £300 to his housekeeper. He subsequently gave her £300, and told her to hand a sealed letter to his executors after his death. When the executors opened the letter they found it contained a declaration that the £300 given was to adeem the legacy. It was held that the letter was not admissible in evidence, and that the legacy was not adeemed by the gift.

¹ *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482 ; 20 Digest 453, 1770.

² *Ibid.*

³ [1912] 1 Ch. 591 ; 20 Digest 452, 1768.

BOOK I (B).

Section IV. Mistake and Misrepresentation.

SUMMARY.

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ARTICLE 102.

Mistake and Misrepresentation.

(1) Where a person, party to an agreement to enter into a legal relationship with another, is induced to agree thereto by a misconception of the facts surrounding or the legal rights and obligations arising out of such relationship, such misconception must have arisen either through a *mistake* on his own part or through *false representations* made to him by others.

(2) Where such misconception arose through false representations, then, if those who made such representations honestly believed them to be true, the agreement is said to have been induced by *innocent misrepresentation*, but if

they knew them to be false or made them recklessly, not caring whether they were true or false, the agreement is said to have been induced by *fraudulent misrepresentation*.

(3) Where such misconception is as to the surrounding facts it is said to be, according as it arises, a *mistake* or *misrepresentation of fact*; where as to the legal rights and obligations, a *mistake* or *misrepresentation of law*.

Paragraph (2).

We are not concerned here with what amounts to a representation in law. That is dealt with later. What is important here is the distinction between innocent and fraudulent misrepresentation. This distinction was finally settled by the House of Lords in *Derry v. Peek*¹; and an exposition of the law on the subject is contained in the judgment of BOWEN, L.J., in *Le Lievre v. Gould*.²

In an action for fraudulent misrepresentation, as his lordship points out in that case,³ the direction given to the jury was this: "The jury were told that before they found a verdict against a man who was charged with fraudulent misrepresentation, they must be satisfied either that he had stated what was untrue, knowing that it was untrue, and intending that the untruth should be acted upon, in which case—a wilful lie being a wicked thing—he was necessarily dishonest, or, at any rate, they must be satisfied that, if he did not know that the statement was untrue, he made it deliberately intending that it should be acted upon, and not knowing and not caring whether it was true or false. If a man makes a wilful statement, intending it to be acted upon, and he is reckless whether it is true or false, he has a wicked mind; but his mind is wicked, not because he is negligent, but because he is dishonest in not caring about the

¹ (1889), 14 App. Cas. 337; 35 Digest 27, 185.

² [1893] 1 Q. B. 491; 35 Digest 28, 187.

³ At p. 500.

truth of his statement. In the first case, it is the knowledge of the falsehood, in the second, it is the wicked indifference, which constitutes the fraud."

This case and *Derry v. Peek*¹ put an end to the doctrine of constructive fraud—that is, the doctrine by which a person was held liable to an action in damages for fraud, although it was admitted that he was not fraudulent, but merely grossly negligent. Negligence, if gross, may be evidence of fraud, but never in itself constitutes fraud. There can be no fraud without dishonesty.

Even if the false representation is false to the knowledge of the person making it, it is not fraudulent if it is not made with the intention of inducing a person to enter into a certain legal relationship. This is shown by the case of *Tackey v. McBain*.² There the director of a company was pressed by numerous dealers in its stock to disclose to them the nature of the report of an expert who had been sent to investigate the condition of the company's undertaking. The expert's report had been received and the director knew this; but to stop further inquiries he told the dealers that no report had yet reached the company. The dealers inferred from this that the report was delayed because it was unfavourable and sold in consequence the stock of the company, which fell heavily in value. Subsequently the report was published and proved very favourable. The dealers sued the director for fraud. The jury found that the director made the statement knowing it to be false and that the plaintiffs acted on the statement and were damnified. They found, further, that the defendant did not make it to induce them to act. It was held that there was no fraud.

A fraudulent misrepresentation is none the less fraudulent because it is accompanied by a statement that the party to whom it is made must not rely upon it, but should verify the representation for himself. Thus, in *Pearson v. Dublin Corporation*,³ the engineer of the corporation put statements in a specification for work which,

¹ *Supra*.

² [1912] A. C. 186; 35 Digest 59, 541.

³ [1907] A. C. 351; 35 Digest 15, 83.

it was alleged, he knew to be false. But the specification was accompanied by an announcement that intending contractors must verify for themselves all statements of fact. It was held that if the engineer knew that his statements were false and dishonest, they were fraudulent notwithstanding such announcement.

Paragraph (3).

It is not always easy to say whether a mistake or misrepresentation is one of law or one of fact. The rule followed by the courts seems to be this : if a person know or have represented to him the surrounding circumstances accurately, and knowing these, he mistakes, or has misrepresented to him, the legal rights resulting therefrom, this is a mistake or misrepresentation of law. On the other hand, if, without stating the facts, the other party misstates to him the joint effect of the surrounding circumstances and the law applicable, this is a misrepresentation of fact. As JESSEL, M.R., puts it in *Eaglesfield v. Marquis of Londonderry*¹: "A misrepresentation of law is this: when you state the facts and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, 'You may; she is a single woman of large fortune.' It turns out that the man who gave the answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void. . . . He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told the whole story and all the facts, and said, 'Now, you see, the lady is single,' that would have been a misrepresentation of law."

¹ (1875), 4 Ch. D. 693, at p. 702; 35 Digest 11, 44.

A good example of a misrepresentation partly of law and partly of fact is the case of *Cooper v. Phibbs*.¹ In that case, by the misreading of a private Act of Parliament, A. believed and represented to his nephew that he (A.) was entitled absolutely to a fishery. On A.'s death his nephew, believing what A. had represented, took a lease of such fishery. Afterwards, on reading the private Act, he saw that the property was his own. It was held that he was entitled to have the lease rescinded.

It is to be remembered that any question of foreign law is a question of fact; and accordingly all mistakes and misrepresentations of foreign law are not mistakes or misrepresentations of law, but of fact.² What is law outside England is in an English court always a question of fact upon which expert evidence may be given.

ARTICLE 103.

Mistakes and Misrepresentations of Law.

Where a person is induced to agree to enter into a legal relationship with another by a mistake or misrepresentation of law, such person is bound by his agreement unless the other party to it—

- (i) knew of the mistake or misrepresentation and took advantage of it; or
- (ii) was an officer of the court who in that capacity received property or acquired rights under the agreement; or
- (iii) was in a fiduciary position towards the person agreeing.

The principle underlying this rule is *Ignorantia juris haud excusat*—a maxim in which (as pointed out by Lord

¹ (1867), L. R. 2 H. L. 149; 35 Digest 93, 27.

² *Leslie v. Baillie* (1843), 2 Y. & C. (N.R.) 91; 8 Digest 476, 459.

WESTBURY in *Cooper v. Phibbs*¹) "the word *jus* is used in the sense of denoting general law, the ordinary law of the country. When the word *jus* is used in the sense of denoting a private right, that maxim has no application." As already pointed out, most representations as to private rights are really representations as to mixed questions of law and fact, and as such are always treated as representations of fact.

In the case of *Eaglesfield v. Marquis of Londonderry*,² a company had issued £85,000 "No. 1 preference stock," which had precedence over "No. 2 preference stock" and the ordinary shares. Under certain Acts of Parliament the company had power to issue £15,000 further preference stock, which, by a mistake in interpreting the Acts, the company thought would rank with the No. 1 preference stock. This stock they issued, describing it as No. 1 preference stock in the certificate. Subsequently the court decided that the new stock ranked after both No. 1 and No. 2 preference stock.

The plaintiff, being aware of the Acts of Parliament at the time, bought some of the £15,000 stock knowing it was not part of the £85,000 No. 1 preference stock, but new stock which he believed would rank with that. Afterwards he sued for rescission of contract. JESSEL, M.R., held that the misdescription of the stock in the certificate was a misrepresentation of fact. The Court of Appeal reversed this decision, holding that as the plaintiff never thought the stock was part of the £85,000 No. 1 preference stock, but merely new stock issued under an Act of Parliament which he and the company both thought made it rank with that stock, there was only an innocent misrepresentation of law, and the plaintiff was therefore not entitled to rescission.

(i) A wilful misrepresentation of law is a misrepresentation of fact, since it misrepresents the state of the representer's mind, which is a physical fact.³

¹ *Supra*.

² (1875), 4 Ch. D. 693; 35 Digest 11, 44.

³ *British Workman's and General Assurance Co. v. Cunliffe* (1902), 18 T. L. R. 425, 502; 35 Digest 11, 40; *Phillips v. Royal London Mutual Assurance Co.* (1911), 105 L. T. 136; 12 Digest 287, 2357.

(ii) The rule as to payments made by mistake of law to officers of the court is stated thus by KEKEWICH, J., in *Re Opera, Limited*¹: "If the assets in the hands of an officer of the court on behalf of creditors or others have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the court will compel its officer to recognise the rules of honesty as between man and man and to act accordingly."

This rule, which Lord ESHER in *Ex parte Simmonds*² pronounced a good, a righteous, and a wholesome principle, was first applied to a trustee in bankruptcy; but now it has been extended to all officers of the court receiving payments by mistake of law in that character. If the officer has, before the mistake is discovered, distributed the funds, he must make compensation out of any future moneys coming into his hands in the same matter.³

Nor is the rule confined to cases where property has actually been transferred or money actually paid to the officer; and the court may order the officer not to insist on his legal rights to recover money or property, if to insist on them would not be morally honest. Thus where the wife of a bankrupt, in the mistaken belief that she would benefit, paid premiums on a policy of insurance which formerly had belonged to the bankrupt and had become vested in the trustee, and the trustee stood by and allowed her to do so, it was held that the trustee could not take the policy moneys without repaying to the wife what she had spent in premiums.⁴ But the result would be different if the trustee in bankruptcy was unaware that the premiums were being paid,⁵ and the general principle is that the rule is confined to cases in which it would be

¹ [1891] 2 Ch. 154; 3 Ch. 260; 35 Digest 162, 576.

² (1885), 16 Q. B. D. 308; 4 Digest 205, 1890.

³ See *Ex parte James* (1874), 9 Ch. App. 614; 4 Digest 15, 60; *Re Rhoades*, [1899] 2 Q. B. 347; 23 Digest 374, 4429; *Re Thellusson*, [1919] 2 K. B. 735; 4 Digest 205, 1893.

⁴ *Re Tyler*, [1907] 1 K. B. 865; 4 Digest 206, 1895.

⁵ *Re Stokes, Ex parte Mellish*, [1919] 2 K. B. 256; 5 Digest 733, 6352.

morally dishonest or dishonourable for the officer of the court to insist on his strict legal rights.¹

(iii) This is mentioned here merely for completeness. The rules regulating dealings between persons in a fiduciary relation are discussed elsewhere.²

ARTICLE 104.

Fundamental and Incidental Mistakes of Fact.

(1) Where a person is induced to agree in form to enter into a legal relationship with another person by an entire mistake of fact as to—

- (i) the subject-matter of the transaction ;
or
- (ii) the legal relationship intended ; or
- (iii) the identity of the other party to the agreement ;

then the parties are never *ad idem*, and there is no agreement in law or in fact between them. Such a mistake is said to be a *fundamental* mistake of fact.

(2) Though there is no agreement in law or in fact between the parties to such a transaction, yet a party may be estopped from pleading this if the other party did not know of his mistake, and if—

- (i) such other party has in consequence of the transaction changed his position ;
or

¹ See *Re Wigzell*, [1921] 2 K. B. 835 ; Digest Supp. ; *Scranton's Trustee v. Pearce*, [1922] 2 Ch. 87 ; 25 Digest 418, 224.

² *Infra*, Article 113.

(ii) the transaction relates to money paid by mistake, and such money has been paid under pressure of legal process initiated by the payee ; or

(iii) the transaction relates to the sale of land, and it has been completed by conveyance.

(3) A mistake of fact not coming within paragraph (1) is called an *incidental* mistake.

Where a person is induced to agree to enter into a legal relationship with another person by an incidental mistake of fact, he is bound by his agreement ; but where the agreement is to sell or purchase land, or any agreement of which in ordinary circumstances specific performance would be decreed, then on an action for specific performance against the party damaged by the mistake, the court will not grant a decree in cases where such decree would inflict great hardship upon the party in question.

Paragraph (1).

The decisions as to mistakes are not very clear, nor very easy to reconcile. The broad rule, however, which seems to be deducible from them is that a mistake of fact does not affect in law an agreement unless the mistake is fundamental, and then it prevents there being in law any agreement at all. This rule, of course, is subject to many limitations and refinements, some of which will be referred to here.

First, as to examples of fundamental mistakes. If Blackacre and Whiteacre are being sold at the same auction, and A., intending to buy Blackacre, by mistake bids for and has knocked down to him Whiteacre, this is a fundamental mistake as to the subject-matter of the transaction, and there is no agreement. A. and the

auctioneer were at cross purposes, and therefore there could not be any agreement between them.¹

Again, if A., intending to mortgage Blackacre for £1,000, agrees with B. by mistake to sell it for that sum, here there is a fundamental mistake as to the legal relationship intended. A. intended to mortgage only, B. intended to buy, and therefore there could be no agreement between them.

In the third place, if A., believing that he is contracting with B., goes through the form of making an agreement with C., A.'s mistake as to the identity of the other contracting party may prevent any contract coming into existence.² This is because A. may never have intended to contract with C. at all, so that the parties to the apparent agreement were never *ad idem*. It is essential, however, that the circumstances should indicate that there was no real agreement. Therefore, the person who seeks to have the apparent contract set aside must be able to prove that the consideration of the person with whom he thought he was contracting entered into the contract to such an extent that he would not have been equally willing to contract with anyone else.³ Again, the contract will not be declared void *ab initio* if C. was actually in A.'s presence when agreement was reached, so that he was a person identified by sight and hearing. In such a case, if C. represents himself to be B., the contract may be voidable for fraud, but it will not be void *ab initio*, because A. did intend, in fact, to contract with the person present.⁴

An example which is usually treated as not coming within the rule is the case of money paid by mistake or on total failure of consideration. It is, however, really in its essence but an application of the rule. This is shown by the consideration that to make such money recoverable the mistake under which it is paid must be

¹ *Van Praagh v. Everidge*, [1903] 1 Ch. 431; 35 Digest 101, 86.

² *Cundy v. Lindsay* (1878), 3 App. Cas. 459; 35 Digest 98, 72; *Gordon v. Street*, [1899] 2 Q. B. 641; 35 Digest 44, 393.

³ *Smith v. Wheatcroft* (1878), 9 Ch. D. 223; 35 Digest 43, 439.

⁴ *Phillips v. Brooks*, [1919] 2 K. B. 243; 39 Digest 533, 1451. Cf. *Lake v. Simmons*, [1927] A. C. 487; 35 Digest 97, 64.

fundamental. In the words of BRAMWELL, B., in *Aiken v. Short*,¹ the mistake must be "as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money." In other words, the mistake must go to the whole basis of the transaction—the payor's liability, in fact, to pay.

A good example of money paid by mistake or recoverable on total failure of consideration is *Re the Bodega Company, Limited*.² The defendant was a director of the B. company. By the articles it was provided that a director who became interested in any contract with the company should *ipso facto* cease immediately to be a director. The defendant, unknown to the other directors, became so interested. He continued to act as director and to receive director's fees for his services. When it was discovered that he was interested in the contract an action was brought to recover back the fees paid to him, on the grounds—(1) that they were paid under a total mistake of fact as to his not being a director, and (2) that there was a total failure of consideration, since though he had done the work of a director, he had never been asked to do so, and therefore on the ordinary law of contract he had rendered no services for which remuneration was due. It was held that the company was entitled to recover on both grounds. "Consideration," as used in the phrase "total failure of consideration," does not mean that no consideration in fact was given, but that there was no consideration sufficient to support an action to recover the remuneration.³

It has been decided that mere negligence on the payor's part will not prevent his recovering money really paid by mistake.⁴ It is submitted that the same rule applies to all transactions originating in fundamental mistakes,⁵ and that such transactions become binding only on

¹ (1856), 1 H. & N. 210, at p. 215; 35 Digest 148, 461.

² [1904] 1 Ch. 276; 35 Digest 147, 457.

³ *Per* FARWELL, J., at p. 287.

⁴ *Durrant v. Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234; 20 Digest 530, 2527.

⁵ See *Van Praagh v. Everidge*, [1903] 1 Ch. 434; 35 Digest 101, 86.

the grounds stated in paragraph (2) of the above Article.

The rule applies equally to credit given by mistake. Thus, in *Ward and Company v. Wallis*,¹ the plaintiffs, in bringing an action against the defendant, credited him by mistake with having paid £75 on account, and sued only for the balance. Discovering after judgment their error, the plaintiffs began a second action for the £75 credited by mistake. It was held that they were entitled to recover. "It is well settled," said KENNEDY, J.,² "that an allowance in account is equivalent to a payment."

Paragraph (2).

By estoppel is meant that the court will not allow a party to rely on certain matters, even though those matters, if established, would entitle him to the court's decision. Estoppel by representation, though probably originally an equitable doctrine, has since *Pickard v. Sears*³ been treated as belonging to common law.

No person can claim the benefit of estoppel unless he acted *bonâ fide* in the transaction. If A. makes by mistake an offer to sell Blackacre for £1,000, when he meant merely that he would let it at that rent, and B. accepts the offer, knowing of the mistake, B. cannot be heard to say that he took advantage of what he knew to be a blunder.⁴ In the same way, if A. sues B. for £100 knowing that only £50 are owing, and B. pays by mistake £100, A. will not be heard to say that though he knew only £50 to be due, still, since B. paid under pressure of process of law, he is entitled to keep the £100. Thus, in *Ward and Company v. Wallis*⁵ the defendant was aware that the amount for which the plaintiffs had given him credit was not in fact paid. It was held that the plaintiffs could still recover it, though the credit was given in a previous action.

¹ [1900] 1 Q. B. 675 ; 35 Digest 157, 539.

² At p. 670.

³ (1837), 6 A. & E. 475 ; 35 Digest 474, 2085.

⁴ *Porter v. Moore*, [1904] 2 Ch. 367 ; 21 Digest 298, 1070.

⁵ *Supra*.

(i) A common instance of this arises where money is paid by mistake to an agent who, before the mistake is discovered, has accounted to his principal for it. In such a case, if the agent received it innocently, no action lies against him.¹

(ii) By payment under pressure of legal process is meant here not merely recovery under judgment of a Court of Law, but payment after the commencement of legal proceedings. Thus, in *Moore v. Vestry of Fulham*,² after summons issued to recover the money alleged to be owing, the defendant paid. It was held that the money was paid under pressure of legal process.

Apparently this principle does not apply to payments under a consent order in an action, agreed to under a mistake of fact.³ Thus, in *Huddersfield Banking Company v. H. Lister and Son, Limited*,⁴ the debenture-holders of a certain company agreed to an order for the sale by the receiver of the company of certain machinery, on the mistaken assumption that such machinery was not annexed to the freehold and therefore not included in their mortgage. After the sale was completed it was discovered that the machinery was in fact so annexed. The debenture-holders then applied to the court to set aside the order. It was held that as it was based upon a mistake, the order must be set aside, and that the price of the machinery was money had and received by the receiver on their behalf. LINDLEY, L.J., in the Court of Appeal, held that wherever the agreement could be set aside if there were no consent order, it could be set aside notwithstanding a consent order.⁵

(iii) This exception to the rule—if it is an exception—is very limited in its operation. It applies only to the case of a vendor of land *bonâ fide* selling it when his title

¹ See *Kleinwort v. Dunlop Rubber Company* (1907), 97 L. T. 263; 35 Digest 156, 530.

² [1895] 1 Q. B. 399; 12 Digest 561, 4663.

³ See *Marshall v. James*, [1905] 1 Ch. 432; 21 Digest 642, 2219.

⁴ [1895] 2 Ch. 273; 4 Digest 343, 3219.

⁵ *Quære*, if there had been no consent order in this case, but the parties had merely agreed after action brought that the property belonged to the company, whether that agreement could have been set aside?

to it is bad. Here it may be said that there is a total failure of consideration just as if he had sold an annuity which had lapsed, in the bonâ fide belief that it still existed,¹ or a life assurance where the assured was dead, in the bonâ fide belief that the insured was still living.² In both of these cases the court would grant rescission of contract after assignment just as before—in the first case, on the application of the vendee, and, in the second, on the application of the vendor. But in the case of the sale of land by a vendor having had a bad title the court would not grant rescission even though the next day after the conveyance the purchaser was evicted by the person to whom the land really belonged.³ This seems settled law, at any rate where the vendor had a possessory title. But it cannot be said that a vendor who has a possessory title has no interest in the land, and if he has an interest it cannot be said that there has been a total failure of consideration. Where there is a total failure of consideration there seems no doubt that the sale can be set aside even after conveyance.⁴ Thus, where land actually belonging to the purchaser is sold to him, the court will set the sale aside for total failure of consideration.⁵ And this is the case equally when the sale was induced by innocent misrepresentation.⁶

Paragraph (3).

A good example of an incidental mistake as to the subject-matter of an agreement is seen in *Tamplin v. James*.⁷ There a property called "the Ship" was offered for sale by auction. In the particulars of sale it was accurately described, and there were displayed on the walls of the auction-room plans giving accurately the frontages. It was, however, actually occupied in con-

¹ *Ship's Case* (1865), 2 De G. J. & S. 544; 9 Digest 140, 777.

² *Scott v. Coulson*, [1903] 2 Ch. 249; 35 Digest 103, 100.

³ *Soper v. Arnold* (1887), 37 Ch. D. 96; 40 Digest 133, 1053.

⁴ *Debenham v. Sawbridge*, [1901] 2 Ch. 98; 40 Digest 110, 872.

⁵ *Bingham v. Bingham* (1748), 1 Ves. sen. 126.

⁶ *Cooper v. Phibbs* (1867), 1 L. R. 2 H. L. 149; 35 Digest 93, 27.

⁷ (1878), 15 Ch. D. 215; 35 Digest 101, 84.

junction with two other premises not belonging to the vendors. The defendant, who knew the property, assumed, without looking at the particulars or plans, that the property to be sold was the property as occupied. He bought it, and on discovering his mistake refused to complete. It was held that he was not entitled to rescission or a refusal of specific performance. Here the parties were *ad idem*. They both intended to deal with the property called "the Ship." But the defendant, through no fault of the plaintiffs, made a mistake as to the exact quantity of land included under that description.¹

ARTICLE 105.

Negative and Positive Misrepresentations of Fact.

Misrepresentation is of two kinds, negative and positive.

By *negative misrepresentation* is meant a failure to disclose facts where there is a legal duty to disclose them.

By *positive misrepresentation* is meant the actual representation by words or conduct of facts as being different from what they are.

By negative misrepresentation is meant here not the *suppressio veri*, which has the effect of making the facts disclosed misleading. Thus, in *Delany v. Keogh*,² an auctioneer in selling a leasehold property stated that the rent was £25 a year but the landlord accepted £18 (as was the fact). At the time he stated this he knew that the landlord intended to demand the full £25 from

¹ As to the question what hardship will prevent the court granting a judgment for specific performance, see *infra*, Article 166.

² [1905] 1 I. R. 267.

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² [1905] 1 L. R. 267.

a new tenant. This was held to amount to an implied representation, and such implied representations are regarded for present purposes as positive misrepresentations. By negative misrepresentation is meant simply a failure to disclose relevant facts, innocently or otherwise, where the law puts a duty upon the party to disclose them.

Positive misrepresentation usually is made by means of words uttered or written. But it may be made by any act or mode, provided it has the effect of inducing the other party to believe the thing that is not. Thus, the offering for sale of sham antiques may of itself amount to a positive misrepresentation that they are genuine. Here the maxim *Res ipsa loquitur* applies.¹ But the representation must be more than mere puffing of one's goods and vague general statements.²

ARTICLE 106.

What amounts to Misrepresentation in Law.

In order that it may constitute a cause of action a positive or negative misrepresentation of fact relevant to a transaction must fulfil the following conditions :

- (i) It must relate to an existing physical fact.
- (ii) It must relate to a material fact.
- (iii) It must constitute part of the grounds which were intended to induce the person to whom it was made to enter into the transaction.

¹ *Patterson v. Landsberg* (1905), 7 F. 675.

² *Dimmock v. Hallett* (1866), L. R. 2 Ch. 21 ; 40 Digest 49, 322.

- (iv) It must have contributed to induce such person to enter into such transaction.

(i) By saying that a misrepresentation in order to be actionable must be of an existing physical fact, what is meant is that mere expressions of beliefs, hopes, and opinions are not sufficient to ground an action for misrepresentation. The person making the misrepresentation must refer in it to a fact actually existing or which he says actually exists. But in this connection it is to be remembered that the state of the representer's mind is a physical fact. As said by BOWEN, L.J., in *Edgington v. Fitzmaurice*,¹ the state of a man's mind is as much a physical fact as the state of his digestion. Accordingly, if he misrepresents the actual state of his opinions on a particular point, then, if the misrepresentation fulfils the other conditions mentioned in the Article, the representer is liable for false representation.

Further, a mere expression of opinion may amount to an absolute misrepresentation of fact. Thus, a statement that a certain mine is practically ready for work as soon as machinery can be erected amounts to a representation that the mine is in an almost complete state of development.²

(ii) Whether a fact is or is not material is itself a question of fact, not of opinion. Accordingly, where a person either misstates a fact or fails to disclose it, being under an obligation to disclose it,³ he is guilty of misrepresentation, even though he was honestly of opinion that the fact was *not* material.⁴ Again, any fact which is made the basis of a contract is—whether it would be so considered or not independent of the contract's terms—a material fact.⁵

It is to be remembered that a representation as to the contents of a document not shown to the person to whom the representation is made is a representation as to a fact.⁶

¹ (1885), 29 Ch. D. 459, at p. 483; 35 Digest 7, 14.

² *Aaron's Reefs v. Twiss*, [1896] A. C. 273, at p. 283; 35 Digest 7, 16.

³ See next Article.

⁴ *Gordon v. Gordon* (1819), 3 Swanst. 400.

⁵ *Gordon v. Street*, [1899] 2 Q. B. 641; 35 Digest 44, 393.

⁶ *Wauton v. Coppard*, [1899] 1 Ch. 92; 35 Digest 66, 630.

It is also to be noted that what is the law in foreign countries is always a question of fact. As to companies, while all that appears in the public documents of the company—such as the memorandum of association and the articles—is understood to be known to all persons dealing with the company, what has actually happened in meetings of the company or of the directors is not supposed to be known, and a misrepresentation as to proceedings at such meetings is one of which the court will take cognisance.¹

(iii) and (iv) A mere representation by a person having no intention of establishing a legal relation between himself or some one else and the man to whom he makes the representation is not actionable. If, however, the misrepresentation was made for the purpose of inducing the person to whom it was made to enter into a legal relationship, the fact that the latter person might have corrected the misrepresentation had he examined the facts does not in the slightest degree prevent his bringing an action for loss caused by the misrepresentation, if, in fact, he relied upon it.² Further, where a misrepresentation has been made, and the person to whom it was made enters into a legal relation, it will be assumed till the contrary is shown that the latter entered into the legal relationship in consequence of the misrepresentation.³ Where, however, nobody was deceived by the misrepresentation, no action lies.⁴

¹ *County of Gloucester Bank v. Rudry Merthyr Colliery Company*, [1895] 1 Ch. 629; 35 Digest 312, 587.

² *Redgrave v. Hurd* (1881), 20 Ch. D. 1; 35 Digest 47, 417.

³ *Atwood v. Small* (1838), 6 Cl. & F. 232; 35 Digest 41, 363. Cf. *Nash v. Calthorpe*, [1905] 2 Ch. 237; 35 Digest 47, 423.

⁴ *Salomon v. Salomon and Company*, [1897] A. C. 22; 35 Digest 47, 423.

ARTICLE 107.

Where Non-disclosure Constitutes Negative Misrepresentation.

(1) A person entering into an agreement is not under a legal duty to disclose to the other party to such agreement facts within his knowledge relevant to the agreement, even though he knows that the other person is labouring under a mistake as to these facts, and that such mistake is influencing him in entering into the agreement, provided he has not directly or indirectly induced such mistake.

(2) Exceptions to this rule occur in the case of—

- (i) Compromises of disputed claims.
- (ii) Family arrangements.
- (iii) Contracts *uberrimæ fidei*.
- (iv) All agreements between two persons, one of whom stands in a fiduciary relation to the other, in so far as such agreements are within their fiduciary relationship.

Paragraph (1).

The general principle is that mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission or a defence to specific performance.¹

If, however, one of the parties has directly or indirectly induced the mistake, he is bound on discovering the mistake to correct it before the contract is carried out.

¹ *Turner v. Green*, [1895] 2 Ch. 205, at p. 208; 35 Digest 21, 121.

Thus, if a representation is made which was true, or believed to be true, at the time it was made, but is afterwards rendered false by a change in the subject-matter of the transaction or in the circumstances surrounding it, information of this change must be given to the party to whom the representation was made. Thus, in *Davies v. London and Provincial Marine Insurance Company*,¹ the defendants had had an agent of theirs arrested on a charge of felony. The agent's friends, to save him from prosecution on the charge, provided money as security for the repayment of the funds of the defendants which the agent was charged with stealing. Before the security was completed the defendants were informed by their legal advisers that the facts were not sufficient to sustain a charge of felony against the agent. This information was not communicated to his friends until the security was completed. It was held that the agreement for security must be rescinded, and the money deposited returned to the agent's friends. Here, the defendants at the time they accepted the security knew that the charge which had been made by them against the agent was mistaken, and that his friends were bargaining on the understanding that the defendants were resolved to proceed on it. It should be noted incidentally that the fact that the agreement was illegal as a compromise of a charge of felony did not affect the right of the friends to have it rescinded.²

*Porter v. Moore*³ is an instance of a mistake being indirectly induced. There the solicitors for an intending mortgagee of a trust fund induced the trustee to sign a memorandum to the effect that he had received no notice of any charge affecting the trust property. The solicitors did not before doing so inform him that they had submitted this memorandum to the trustee's solicitors, who were considering it. After the trustee had signed, his solicitors informed the mortgagee's solicitors that it was

¹ (1878), 8 Ch. D. 469 ; 35 Digest 31, 228.

² Cf. *Scott v. Coulson*, [1903] 2 Ch. 249 ; 35 Digest 103, 100. See also *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351 ; 36 Digest 242, 807.

³ [1904] 2 Ch. 367 ; 21 Digest 298, 1070.

their practice to advise clients not to sign a memorandum such as that submitted. It was held that the trustee was not bound by the memorandum.¹

Paragraph (2).

(i) The compromise of the action would not have been binding, said JAMES, L.J., in *Maynard v. Eaton*,² "if there had been any concealment of truth, or suggestion of what is false, but that must be understood as relating to what is relevant to the matter to be compromised."

In that case a father bought certain shares in the name of his son, who was an infant. Subsequently, on the company going into liquidation, the son sued the vendor by his father as next friend for false representation. The vendor compromised the action. Subsequently the vendor, on the liquidator discovering that the son was an infant, was placed on the list of contributors. He then tried to have the compromise set aside, on the ground that when it was entered into the fact was concealed from him that the father, and not the son, was the real owner of the shares. It was held that this fact was immaterial, and the compromise was binding. The vendor had compromised the action because he feared that if it was heard the decision would be against him. That did not depend in any way upon whether the father or the son was the true purchaser of the shares.

(ii) The law as to family arrangements is well and concisely stated in the judgment in *Westby v. Westby*³: "Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and especially where those doubts have related to a question of legitimacy, and fair compromises have been entered into to preserve the harmony and affection, or to save the honour, of the family, those arrangements have been sustained by this court, albeit, perhaps, resting upon

¹ Cf. *Moody v. Cox and Hatt*, [1917] 2 Ch. 71; 40 Digest 356, 2999.

² (1874), 9 Ch. App. 414, at p. 422; 9 Digest 330, 2083.

³ (1842), 2 Dr. & War. 503; 24 Digest 951, q.

grounds which would not have been considered as satisfactory if the transaction had occurred between strangers."

Though, however, the court is more reluctant to set aside a family arrangement than a compromise between strangers, still the principle on which it proceeds in both cases is identical. This is stated by TURNER, L.J., in *Brooke v. Lord Mostyn*¹: "If there be no fraud and equal knowledge on both sides, the compromise cannot be disturbed." The fraud may be the work of a third person. Thus, in *Re Roberts, Roberts v. Roberts*,² the parties' family solicitor, honestly believing that a compromise proposed by him was for the benefit of them all, deliberately or by a misconception misrepresented the respective rights of the parties. It was held that the compromise could not be supported.

(iii) It is usual in speaking of contracts *uberrimæ fidei* to confine the expression to contracts of insurance, guarantees, and partnership agreements.³ This, however, though convenient, is inaccurate. Contracts are *uberrimæ fidei*, not because they are contracts of insurance, etc., but because they are contracts in which one party has to rely on the knowledge of the other party as to the risk he takes in entering into the transaction. Thus, not merely are the contracts above mentioned contracts *uberrimæ fidei*, in most cases, but so also are contracts between trustee and cestui que trust,⁴ between client and solicitor, and between guardian and ward.⁵ These latter, however, it will be convenient to consider separately.

Thus, a contract of insurance—whether life, fire, or marine—must in the nature of things be in nearly every case a contract *uberrimæ fidei*, because the insuror must take the insured's word for most of the facts on which he calculates the risks he undertakes.⁶ But a guarantee is usually not a contract *uberrimæ fidei* at all. In guarantees

¹ (1864), 2 De G. J. & S. 373, at p. 416; 35 Digest 114, 183.

² [1905] 1 Ch. 704; 35 Digest 97, 55.

³ *Law v. Law*, [1905] 1 Ch. 140; 35 Digest 75, 738.

⁴ *Supra*, p. 155.

⁵ *Per ROMER, L.J.*, in *Seaton v. Heath*, [1899] 1 Q. B. 782, at p. 792; 35 Digest 22, 133.

⁶ See *Hemmings v. Sceptre Life Association*, [1905] 1 Ch. 365; 29 Digest 358, 2903.

the other party to the guaranty has in most cases no negotiations with the guarantor. The negotiations are with the person whose liability is being assured, and, in the absence of fraud, under such circumstances the party to whom the guarantee is given is entitled to assume that the guarantor satisfied himself as to the transaction before becoming surety.¹ Where, however, the person becoming surety does so at the request of the person to whom the guarantee is given, the latter is bound to disclose all material facts within his knowledge.

It is often said that contracts for the sale of land are *uberrimæ fidei*. This is not quite accurate. It is true that the vendor of land has to produce an abstract of his title to the land, and such abstract, so far as it extends, must set out his title accurately. But he is not bound to disclose defects of title not coming within such abstract. On the other hand, in the particulars of sale the vendor must describe his property correctly, and non-disclosure of a material defect may entitle the purchaser to rescind² or (in a case where the defect is not so serious as to make the property sold substantially different from that for which he bargained) to claim compensation.³ For instance, where the particulars of sale of leasehold property did not disclose the fact that the lease contained *unusual* covenants, it was held that a purchaser, who had not been afforded an opportunity of inspecting the lease before entering into the contract, was entitled to rescind.⁴ The same result would follow if the particulars of sale failed to disclose that the property was subject to an easement and the purchaser was not afforded an opportunity of inspecting the title before contracting,⁵ and the principle applies even though the purchaser has agreed to accept the vendor's title.⁶ On principle it would

¹ See *Hemmings v. Sceptre Life Association*, [1905] 1 Ch. 365; 29 Digest 358, 2903.

² *Flight v. Booth* (1834), 1 Bing. N. C. 370; 40 Digest 106, 842.

³ *Shepherd v. Croft*, [1911] 1 Ch. 521; 40 Digest 45, 282.

⁴ *Re White and Smith's Contract*, [1896] 1 Ch. 637; 40 Digest 135, 1065.

⁵ *Ashburner v. Sewell*, [1891] 3 Ch. 405; 40 Digest 90, 700.

⁶ *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666; 40 Digest 136, 1073.

seem, also, that the vendor is under a duty to disclose latent defects in the physical quality of the property, which are known to him but not to the purchaser. With regard to defects unknown to either party, however, non-disclosure of these will affect the contract only in cases where they render the property unsuitable for the purpose for which both parties knew that it was purchased. Thus where land was sold as building land and the purchaser discovered an underground culvert, which would seriously hamper building operations but of which neither he nor the vendors had been previously aware, it was held that the purchaser could rescind.¹ But the principle of that case applies only to latent defects. The vendor is under no duty to disclose patent defects; and patent defects have been defined as defects visible to the naked eye or arising by necessary implication from something which is visible to the naked eye.² The effect of conveyance is discussed in the next article.

(iv) It has been said that contracts between trustee and cestui que trust, solicitor and client, guardian and ward, etc., are, strictly speaking, contracts *uberrimæ fidei*. The first of these have already been dealt with.

As an example of how far the court will go in upholding the rule that where a fiduciary relation exists between two parties to a transaction the fullest disclosure must be made, the case of *Moody v. Cox and Hatt*³ may be cited. There the plaintiff entered into a contract to buy property from the defendants, who were trustees of the property. The plaintiff retained one of the defendants as his solicitor to carry through the negotiations for the purchase and complete the transaction, and he gave bribes to the other defendant to help forward the negotiations. Under the contract the price the plaintiff was to pay for the property was to the knowledge of the defendants much more than it was worth. It was held that it was the defendant's solicitor's duty as solicitor to disclose to the plaintiff all he knew affecting the value, and

¹ *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258; 40 Digest 45, 286.

² *Yandle v. Sutton*, [1922] 2 Ch. 199; 40 Digest 42, 261.

³ [1917] 2 Ch. 71; 40 Digest 356, 2999.

as he had not done so the plaintiff, notwithstanding his having bribed the other defendant, was entitled to have the contract rescinded.

It is to be remembered that a party entitled to the rescission of a contract on the ground of negative misrepresentation may waive, expressly or impliedly, his right to rescind or may be estopped from asserting it by *laches* on his part.¹ And estoppel may arise even where the party was not fully aware of the extent of the negative misrepresentation. Thus, on the dissolution of a partnership one partner did not reveal to the other all the assets of the firm. In consequence the other partner sold his share in them for less than its value. Afterwards he learnt of some of these undisclosed assets but not others. Nevertheless he accepted payment subsequently of the original price. Subsequently he learnt of the other undisclosed assets. It was held that he was estopped by *laches* from impugning the contract.²

ARTICLE 108.

Effect of Innocent Misrepresentation.

An innocent misrepresentation will, when made by the other party to the transaction, sustain an action for rescission of the agreement induced by it.

Where, however, the agreement has been executed by conveyance or assignment of the subject-matter of the agreement, such misrepresentation will not sustain an action for rescission of the conveyance or assignment.³

¹ See *infra*, p. 438.

² *Law v. Law*, [1905] 1 Ch. 140; 35 Digest 75, 738. See also *Hemmings v. Sceptre Life Association*, [1905] 1 Ch. 365; 29 Digest 358, 2903.

³ See *Redgrave v. Hurd* (1881), 20 Ch. D. 1; 35 Digest 47, 417; *Re Glubb*, [1900] 1 Ch. 354; 25 Digest 523, 163; *Wilde v. Gibson* (1848), 1 H. L. Cas. 605; 40 Digest 350, 2966.

Innocent misrepresentation as to one contract will not induce the court to grant rescission of another contract between the same parties unless the two contracts are so complicated as to make them inseparable transactions ; but where it appears, that but for the innocent misrepresentation as to the one the party misled would not have entered into the other, the court may refuse specific performance of the second contract.¹

After the contract has been completed by conveyance the court will not rescind. Thus, in *Seddon v. North Eastern Salt Company, Limited*,² the plaintiff bought certain shares in a company from the defendants. During the negotiations for sale the defendants made certain innocent misrepresentations as to the business of the company. After sale these were discovered. It was held that, though if the misrepresentations had been discovered before the transfer of the shares the plaintiff might have rescinded, he was not entitled to rescind after such transfer.³

For the purpose of rescission, an executed lease is a conveyance within this Article.⁴

ARTICLE 109.

Effect of Fraudulent Misrepresentation.

(1) A fraudulent misrepresentation will, when made by the other party to the transaction, sustain an action for rescission of the contract induced by it, or, if the contract is one of sale, of the conveyance completing such contract ; and will, in any case, sustain an action for damages for deceit against the party making the fraudulent misrepresentation.

¹ See *Holliday v. Lockwood*, [1917] 2 Ch. 47 ; 40 Digest 257, 2233.

² [1905] 1 Ch. 326 ; 35 Digest 20, 118.

³ But see *infra*, p. 439.

⁴ *Angel v. Jay*, [1911] 1 K. B. 666 ; 30 Digest 479, 1408.

(2) A conveyance completing a contract of sale induced by fraudulent misrepresentation is, however, not void, but only voidable. Accordingly, if, after the conveyance and before action brought, the property conveyed is sold and transferred at law to a purchaser for value without notice of the fraud, no action for rescission lies against such third person.

ARTICLE 110.

Responsibility for Misrepresentations of an Agent.

(1) Misrepresentations within Article 106, and whether innocent or fraudulent, will, when made by an agent, give the person to whom they are made the same remedy against the principal as if they had been made by the principal, where :

- (i) the agent was specially authorised by the principal to make the misrepresentations ; or
- (ii) the agent was generally authorised by his employment to make representations in that connection on behalf of his principal ; or
- (iii) the agent's representations, though not made with the special or general authority of the principal, are adopted by him.

(2) Misrepresentations by an agent unauthorised in any way to make them will render the principal liable to account to the person to

whom they are made for any profit the principal may have gained through them.

(3) Misrepresentations by a stranger will have the same result as regards a party who, when entering into a contract, is aware that the other party is being induced to enter into it by the representations of the stranger, and, where such representations are fraudulent, is also aware that they are in fact false.

BOOK I (B).

Section V. Fraud and Undue Influence.

SUMMARY.

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ARTICLE 111.

Fraud in Law.

Besides agreements induced by fraudulent misrepresentations, every agreement is at common law voidable as against one party to it where it can be shown that the other party has in connection with such agreement been guilty of a dishonest act going to the basis of the understanding between the parties. This, like fraudulent misrepresentation, is called actual fraud.

As was pointed out in *Derry v. Peek*,¹ actual fraud is essentially a common law tort, and as such its discussion in detail is out of place in a treatise on equity. Having, however, in dealing with misrepresentation, to discuss the most important kind of actual fraud—that due to fraudulent misrepresentation—it is proper to add the above rule lest it may be thought that no fraud renders an agreement voidable except a fraud which actually induces the agreement.

¹ (1889), 14 App. Cas. 337; 35 Digest 27, 185.

The rule is based on the case of *Panama and South Pacific Telegraph Company v. India Rubber, Gutta Percha and Telegraph Works Company*.¹ There the defendants agreed with the plaintiffs to lay a telegraph cable at a certain price which was to be payable in twelve instalments as the work progressed, on the certificate of the plaintiffs' engineer, who was named in the contract. After the contract was entered into the defendants agreed with the engineer that he should lay the cable at a price payable by instalments on the defendants receiving payment from the plaintiffs. It was held that the plaintiffs were entitled to rescind.

The defendants had not induced the contract by fraud, but subsequently to entering into it they had been guilty of an act which made it impossible for the plaintiffs to secure its honest performance. This was the sole ground assigned by JAMES, L.J., and one of those assigned by MELLISH, L.J., for the decision. As was said by WILDE, B., in *Udell v. Atherton* ²: "Fraud in all courts and at all stages of the transaction has been held to vitiate all to which it attaches."

ARTICLE 112.

Fraud in Equity.

(1) Where fiduciary relations exist between the parties to a transaction and such relations impose a fiduciary duty on one party to be careful, mere negligence on the part of this party will amount to fraud in equity and make him liable to account to the other for loss resulting from his negligence.

(2) In equity an agreement not proved to be actually fraudulent may be presumed to be

¹ (1875), 10 Ch. D. 515; 1 Digest 484, 1635.

² (1861), 7 H. & N. 172, at p. 181; 1 Digest 589, 2253.

so unconscionable that it is tainted with fraud, and therefore voidable. This presumption will be rebutted by proving that in fact it is fair and reasonable.

This presumption will be made for the benefit of the weaker party where the parties to the agreement dealt with each other on very unequal terms.

(3) In equity an agreement intended to be an imposition or deceit upon other persons not parties to the agreement is regarded as fraudulent, and therefore voidable.

(4) If the donee of a special or limited power of appointment does not exercise it *bonâ fide* for the benefit of the objects of the power, but makes an appointment which, whilst it may be on the face of it correct, is intended to produce, or will necessarily result in, some benefit for the appointor or for some non-object of the power, equity holds that there has been a fraud on the power and that the purported exercise of it is void.

Paragraph (1).

This principle is best illustrated by *Nocton v. Ashburton*,¹ the facts of which have been stated and discussed already.²

Paragraph (2).

It is to be noted that undervalue in itself never is sufficient to constitute presumed fraud. It is a necessary element merely, which, taken in conjunction with other circumstances—and more particularly such circumstances as the ignorance, poverty, or weakness of mind of the

¹ [1914] A. C. 932; 35 Digest 55, 493.

² *Ante*, pp. 10, 250.

other party—may be sufficient to induce the court to hold that till the contrary is shown it will presume that the agreement was brought about by fraud.

Thus, in *Fry v. Lane*,¹ persons who occupied the position of a laundryman and a plumber becoming entitled to shares in a certain property were taken by A. to his solicitor. A. entered into an agreement with them to purchase their shares at a gross undervalue, and his solicitor acted both for him and for them, giving a great advantage to A. It was held that the sale was voidable.

As regards what used to be called snatching bargains from expectant heirs the view was formerly more stringent. The phrase “expectant heirs,” as used in this connection, is not altogether a happy one, because it is used to cover not only expectant “heirs” in the strict sense of that word, but reversioners and all persons with a hope or expectancy of taking a benefit under the will or intestacy of one who is still alive. Bargains with such persons were set aside if the purchaser could not show that the price which he had paid was a fair one,² and a fair price was generally taken to be the market price.³ Thus the view emerged that in the case of bargains, whether by way of sale or by way of mortgage, with such persons undervalue in itself was a sufficient ground for setting aside the transaction. It is doubtful whether the authorities ever fully justified that view. Be that as it may, the law was restated in the Sales of Reversions Act, 1867, which is now repealed and re-enacted by section 174 of the Law of Property Act, 1925.⁴ That section enacts that no acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest (including an expectancy or possibility) in real or personal property, for money or money’s worth, shall be liable to be opened or set aside merely on the ground of undervalue.

The result of this provision is to place bargains with so-called “expectant heirs” on the same footing as bargains with any persons who are in a weaker position for pro-

¹ (1888), 40 Ch. D. 312; 25 Digest 272, 962.

² *Perfect v. Lane* (1861), 3 De G. F. & J. 369; 25 Digest 272, 957.

³ *Shelly v. Nash* (1818), 3 Madd. 232; 25 Digest 279, 1046.

⁴ 15 Halsbury’s Statutes 357.

fecting their interests than a normal owner. In fact, the section expressly provides that it "does not affect the jurisdiction of the court to set aside or modify unconscionable bargains." And undervalue may still be a material element in deciding whether a bargain is unconscionable or not. As Lord SELBORNE points out in *Earl of Aylesford v. Morris*¹: "These changes of the law have in no degree whatever altered the *onus probandi* in those cases which, according to the language of Lord HARDWICKE,² raise 'from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of the circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable."³

Paragraph (3).

The most usual examples of this species of equitable fraud were formerly those agreements for what was called marriage brocage, and secret settlements by women about to marry in fraud of the future husband's marital rights. Thus, an agreement under which A. agreed that if B. would help him to secure C. in marriage he would give B. part of C.'s fortune, was a fraud upon C.⁴ If, on the other hand, after C. and A. had agreed to marry, C. secretly conveyed her fortune to B. to hold in trust for her separate use, that would have been a fraud on A.'s marital rights.⁵

¹ (1873), L. R. 8 Ch. App. 484, at p. 490; 25 Digest 269, 940.

² In *Chesterfield v. Janssen* (1750), 2 Ves. Sen. 125, at p. 155; 25 Digest 254, 811.

³ See also *Harrison v. Guest* (1860), 8 H. L. Cas. 481; 25 Digest 267, 917; *Brenchley v. Higgins* (1900), 83 L. T. 751; 25 Digest 272, 965.

⁴ *Hermann v. Charlesworth*, [1905] 2 K. B. 123; 12 Digest 284, 2325.

⁵ *Countess of Strathmore v. Bowes* (1789), 1 Ves. 22; 40 Digest 547, 898.

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⁴ *Hermann v. Charlesworth*, [1905] 2 K. B. 123; 12 Digest 284, 2325.

⁵ *Countess of Strathmore v. Bowes* (1789), 1 Ves. 22; 40 Digest 547, 898.

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⁴ *Hermann v. Charlesworth*, [1905] 2 K. B. 123; 12 Digest 284, 2325.

⁵ *Countess of Strathmore v. Bowes* (1789), 1 Ves. 22; 40 Digest 547,

It would seem, however, that it is now impossible for a conveyance by a woman about to be married, whether the conveyance be secret or not, to be set aside on these grounds. Formerly, such a conveyance, if made without the approbation of the intended husband, might be considered fraudulent as against the intended husband, because the law gave to a husband rights in and over his wife's property, and a secret conveyance by an intended wife could be construed as a fraud on those rights. Since the Married Women's Property Act, 1882,¹ however, a husband has no rights in his wife's property unless she dies intestate and he survives her, and a wife has full power of disposing of her property both in her lifetime and by will. It would seem, therefore, that fraud on marital rights is no longer possible.

The ordinary case now of frauds on third parties is where a debtor, to induce a creditor to join in a composition or offer accepted by the other creditors, secretly agrees to give him better terms than those which the other creditors have mutually agreed to accept.²

Paragraph (4).

The rule is that the donee of a special or limited power of appointment must exercise it *bonâ fide* for the benefit of the objects of the power, and any pretended exercise of the power which infringes this rule will be void as being a fraud on the power. The simplest illustration is where a person having a power to appoint to a certain person or to appoint among a certain class of persons enters into a corrupt bargain with that person or with one or more of that class to exercise the power. Thus if a person who has power to appoint among a certain class appoints, to a person who is a member of that class, pursuant to a bargain with that person to the effect that that person shall return part of the property appointed to the appointor or use it to pay the appointor's debts or shall

¹ 9 Halsbury's Statutes 374.

² *Levita's Claim*, [1894] 3 Ch. 365; 24 Digest 793, 8233. See also *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769; 25 Digest 169, 145.

confer any kind of personal benefit on the appointor, the appointment will be bad.¹ But it is not essential that there should be such a bargain in order that there may be held to be a fraud on the power. The fundamental rule is that a power must not be exercised for the purpose of defeating the object for which it was created. If it is, the appointment will be held to be fraudulent even though there is no bargain with the appointee and even though the appointee is in ignorance of the intention with which the appointor exercised the power. Thus, it has been held that if a father, who has power to create portions for his children and to fix the time at which such portions are to be raised, appoints to an infant child at a time when the child is not in need of a portion but the death of the child is expected, the appointment being made with the child's death in view, the father, as the personal representative of the child, will not in the event of the child's death be allowed to derive any benefit from the appointment, but the property will go as in default of appointment.² In such cases, however, it must always be shown that the intention of the appointor was to benefit himself or some non-object of the power and that he made the appointment with that end in view, the mere fact that, as events turn out, the appointor does benefit will not invalidate an appointment which is made properly and *bonâ fide*.³

The same principle which renders invalid an appointment made to secure a benefit to a non-object of the power also invalidates a revocation, made with the same object, of an appointment already made.⁴ It should be noticed, however, that the revocation of an appointment is not the same thing as the release of a power. Section 155 of the Law of Property Act, 1925,⁵ provides that the donee of a power may by deed release it or contract not to

¹ *Daubeny v. Cockburn* (1816), 1 Mer. 626; 37 Digest 510, 1026; *Re Cohen, Brookes v. Cohen*, [1911] 1 Ch. 37; 37 Digest 492, 860; *Cochrane v. Cochrane*, [1922] 2 Ch. 230; 37 Digest 510, 1024.

² *Hinchinbroke v. Seymour* (1784), 1 Bro. C. C. 395.

³ *Henty v. Wrey* (1882), 21 Ch. D. 332; 40 Digest 621, 1593.

⁴ *Re Jones' Settlement*, [1915] 1 Ch. 373; 37 Digest 508, 1006.

⁵ Replacing sect. 52 of the Conveyancing Act, 1881; 15 Halsbury's Statutes 340.

exercise it. Consequently, there is no imperative duty to make an appointment imposed upon him; and it has been held that he may release or contract not to exercise the power even though the result may be that he obtains a benefit which he could not have obtained by any valid exercise of the power.¹

A question of importance may arise in cases where property has been appointed and the appointment has subsequently been declared to be fraudulent, but in the meantime the appointee has conveyed or assigned the property to a purchaser. In this connection it is necessary to distinguish between a common law power, and a power formerly operating under the Statute of Uses, on the one hand, and an equitable power on the other hand. The exercise of a power of the former kinds passes the legal estate, but the exercise of an equitable power can only operate to pass an equitable interest in the property affected. A fraudulent appointment under a power by which the legal estate has passed is not void but voidable. It follows, therefore, that a purchaser from the appointee, who has given value and has taken without notice, will acquire a good title to the property which he has purchased. But in the leading case of *Cloutte v. Storey*² it was held that an appointment made in fraud of an equitable power is void *ab initio*, and, therefore, a purchaser from the appointee, even though he gives value and takes without notice, obtains no title. The importance of this case has increased considerably as a result of the legislation of 1925. The Statute of Uses is now repealed, and it is provided by section 1 of the Law of Property Act, 1925,³ that, subject to certain exceptions,⁴ every power over land, whether created before or after the commencement of the Act, shall operate in equity only. The result is that at the present time the fraudulent exercise of a power of appointment is, in most cases, void *ab initio*. But some statutory protection to a purchaser

¹ *Re Somes, Smith v. Somes*, [1896] 1 Ch. 250; 37 Digest 504, 971.

² [1911] 1 Ch. 18; 37 Digest 384, 3.

³ 15 Halsbury's Statutes 177.

⁴ *E.g.* the power of a legal mortgagee and the powers of a tenant for life.

from the appointee is given by section 157 of the Law of Property Act, 1925.¹ This section applies to purchases made, after 1925, from appointees, no matter what may have been the date of the appointment itself, and it provides that an instrument purporting to exercise a power of appointment over property which, in default of and subject to any appointment, is held in trust for a class or number of persons of whom the appointee is one, shall not be void on the ground of fraud on the power as against a purchaser in good faith or a person deriving title under a purchaser in good faith. A purchaser in good faith is defined, for this purpose, as "a person dealing with an appointee of the age of not less than twenty-five years for valuable consideration in money or money's worth, and without notice of the fraud, or of any circumstances from which, if reasonable enquiries had been made, the fraud might have been discovered." The protection given by this section is not very wide, because it is limited to cases in which the appointee is one of the persons who would have been entitled in default of appointment, and it is further provided that if the interest appointed exceeds, in amount or value, the interest to which immediately before the execution of the instrument the appointee was presumptively entitled in default of appointment, having regard to any advances in his favour and to any hotchpot provision, the protection afforded to the purchaser shall not extend to such excess.

ARTICLE 113.

Undue Influence.

(1) Every agreement induced by the exercise of undue influence over a party to the agreement is in equity voidable as against such party.

¹ 15 Halsbury's Statutes 341.

(2) Where the relationship between the parties to an agreement is such as to make it likely that one party will be unduly influenced by the other party, then if by such agreement a gift is made to the latter or his wife or child, such agreement will be presumed to have been induced by the exercise of undue influence by the person supposed to possess such influence, until the contrary is shown.

(3) The contrary can only be shown by proving that :

- (i) the person supposed to possess such influence did not in fact possess it ; or
- (ii) the agreement was not in fact entered into on his advice but on the independent advice of a third person.

The three personal grounds on which the common law granted rescission of an otherwise lawful agreement were fraud, coercion, and incapacity. Equity invented a fourth. Without holding that there was actual fraud or coercion, or that the person agreeing was mentally incapable of doing so, it held that a person might enter into an agreement under a combination of circumstances so akin to all the three legal grounds as to make it inequitable to hold him bound by it. This is what is meant by the equitable doctrine of undue influence.

Equity went farther. Not merely did it hold that an agreement induced by undue influence was voidable, but that where one was made between persons occupying certain relative positions it must be presumed to have been induced by undue influence till the contrary was shown. This is really only an application or development of the general principle, that where one person reposes, or, in the nature of things, has to repose, confidence as to any matter in another person, it lies on the latter to show that in his dealings with the other as to such matter he acted fairly and reasonably. Examples of that principle

we have had in the rules as to purchases by trustees from their cestuis que trust, as to constructive trusts, and as to contracts *uberrimæ fidei*.

Where actual undue influence is proved it is for present purposes practically equivalent to fraud. It may be that the person influenced knew clearly what he was doing, and was not actually forced into doing it, and was in his right mind, but the person who influenced him must have acted upon him in such a manner as to reduce him to a state in which he was not fit to be trusted with his own interests. This sort of state usually arises under the influence of religious emotions stirred up by an over-zealous or dishonest spiritual superior or adviser.¹ But, in the making of wills at any rate, there must be more than persuasion to constitute actual undue influence. The person subject to the influence must be unwilling to do the act and be coerced into doing it by the stronger will of, or by the terrors, spiritual or otherwise, held over him by, the other.²

Presumed undue influence arises chiefly in connection with gifts, but as regards sales the cases we have mentioned as to trustees, constructive trustees, etc., might often be based on undue influence as much as on any other ground.³ As to gifts, before it is presumed that they are made under undue influence, it is necessary to prove a relationship between the parties likely to give one of them great influence over the other; and even where such relationship is proved, the inference from it may be rebutted by showing that in fact no such influence resulted.⁴ Thus, the relation of parent and child is presumed to give the parent much influence over the child, but not the child over the parent.⁵ But this may be rebutted by showing that the child has been "emancipated"—that is, that he or she has outgrown the influence which a parent

¹ See *Allcard v. Skinner* (1887), 36 Ch. D. 145; 12 Digest 100, 613.

² *Baudains v. Richardson*, [1906] A. C. 169; 44 Digest 220, 448; *Low v. Guthrie*, [1909] A. C. 278; 23 Digest 132, 1305.

³ See *Wright v. Carter*, [1903] 1 Ch. 27; 40 Digest 553, 956.

⁴ *Willis v. Barron*, [1902] A. C. 271; 27 Digest 142, 1162.

⁵ *In re Coomber, Coomber v. Coomber*, [1911] 1 Ch. 174; 25 Digest 260, 844.

naturally has over a child, either through his or her having reached mature years, and having lived away from home, or having broken with the parent. Till this is shown, the court will presume that a gift made by the child to the parent was made under the parent's influence unless it is shown that it was made in pursuance of independent advice given by somebody else.¹ The same inference arises where the relationship between the parties is one similar to that between parent and child, as, for example, between guardian and ward, person *in loco parentis* and adopted child, trustee and cestui que trust, etc. But that inference does not arise from the relationship of husband and wife. If undue influence is there alleged against the husband it must be proved in fact.² Mere business or professional relations may, as to matters coming within the scope of the relation, give rise to the presumption of influence where the relations are such as presuppose confidence between the parties. Thus, a doctor towards his patient, a clergyman towards his spiritual ward, a solicitor towards his client, a partner towards his other partners, may be presumed to exercise great influence as to matters on which the others are likely to consult him. As to all these terminable relations the strength of the presumption depends on the intimacy and the recentness of the relation.

The law was considered by the Court of Appeal in *Wright v. Carter*.³ There A. made a voluntary settlement of part of his property on his children X. and Y. and on his solicitor Z. There was no evidence that the settlement on Z. was made on Z.'s advice, and it purported to be made in reward for services rendered by Z. The settlement was drawn by another solicitor called in by Z.'s advice. A year later A., being in pecuniary difficulties, entered into an agreement with X., Y., and Z., whereby this settlement was revoked and in consideration of X., Y., and Z. covenanting to pay A. an annuity for his

¹ *Powell v. Powell*, [1900] 1 Ch. 243; 43 Digest 825, 2696. See also *Lancashire Loans, Limited v. Black*, [1934] 1 K. B. 380; Digest Supp.

² *Bank of Montreal v. Stuart*, [1911] A. C. 120; 42 Digest 113, 1096.

³ [1903] 1 Ch. 27; 40 Digest 553, 956.

life, A. settled all his present and future property on X., Y., and Z. equally. This transaction was again carried through by a solicitor called in by Z.'s advice; but apparently the solicitor was not consulted as to the expediency of the transaction. It was held that the second settlement was entirely bad and that the first settlement was good as regarded the interests taken by the children, but bad as regarded the interest taken by Z.

BOOK I.
EQUITABLE RIGHTS.

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BOOK I (C).

Section I. Relief against Forfeitures.

SUMMARY.

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ARTICLE 114.

Penalties and Liquidated Damages.

(1) For the purpose of equitable relief forfeiture means—

- (i) the transfer to one party to a contract of the other party's interest in specific property ;
- (ii) the payment of a sum of money to one party by the other party,

where such transfer or payment is by the terms of the contract to take place on the failure of the other party to perform and observe some or all of the covenants and conditions contained in the contract.

(2) Where the forfeiture is the payment of a sum of money, then, if it is intended—

- (i) to be a punishment for the failure, it is called a *penalty* ;
- (ii) to be and is a reasonable assessment before failure of indefinite damages

likely to result to the other party through such failure, it is called *liquidated damages*.

(3) Equity always relieves against a forfeiture, whether it be the payment of a sum of money or the transfer of specific property, where such forfeiture is in the nature of a penalty.

It never relieves against a forfeiture where it is in the nature of liquidated damages.

Paragraph (1).

Equitable relief against forfeiture can only be given where the forfeiture arises out of contract. Many forfeitures arise out of tenure. For example, by custom a copyhold interest became forfeited to the lord in case the copyholder granted a lease of more than a year without the licence of the lord. Here the court could not relieve.¹ Again, a forfeiture imposed on a gift may be unenforceable because the condition to which it is attached is void as contrary to the policy of the law. Thus, a condition in general restraint of marriage is void ; but a condition in partial restraint—such as not to marry without guardians' consent—may be good, and, if good, any forfeiture resulting on breach cannot be relieved against.²

“The true ground of relief against penalties,” as said by Lord Chancellor MACCLESFIELD in *Peachy v. Duke of Somerset*,³ “is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all that he expected or desired.” Though this principle has been expanded it still states the real foundation of equitable relief.

¹ *Peachy v. Duke of Somerset* (1722), 1 Stra. 447 ; 20 Digest 518, 2451.

² *Re Whiting's Settlement*, *Whiting v. De Rutzen*, [1905] 1 Ch. 96 ; 40 Digest 570, 1066.

³ *Supra*.

Paragraph (2).

An example of equity regarding a money payment as a punishment for failure to perform a covenant arises in connection with covenants for payment of interest on mortgage debts. If interest at an increased rate is payable on failure to pay the interest reserved on the proper days, then the higher rate is regarded as being by way of penalty. If, on the other hand, a deduction is to be made from the interest reserved in case the interest is paid punctually, the higher rate reserved is not regarded as being by way of penalty.

Parties are quite at liberty when entering into a contract to agree what will be considered the damages resulting from breaches of covenants. This is a particularly useful practice where the damages likely to result are very indefinite and difficult to prove. Where this is done the court will enforce the agreement; but where the damages which can result are clearly ascertainable the court holds that anything more agreed to be given must be in the nature of a penalty, and will not enforce it.

The rules stated in the next Article are those followed by the court in deciding whether a forfeiture is or is not intended as a punishment. It sometimes happens that by these a forfeiture which is in fact intended as a punishment is held to be liquidated damages. Thus, in *Strickland v. Williams*,¹ A., being committed to prison for breach of an injunction not to trespass on B.'s land, in order to obtain his discharge entered into a bond with B. to pay B. £100 if he did again trespass on B.'s land. Subsequently A. broke the covenant. Here, in fact, the £100 was intended to be a punishment of A. for breaking his word, but since it came within the rule stated in paragraph (2) of the next Article it was held to be liquidated damages.

Paragraph (3).

The relief which equity gives where it holds a forfeiture to be in the nature of a penalty is this: where the for-

¹ [1899] 1 Q. B. 382; 7 Digest 223, 660.

feiture is of specific property, upon the person liable paying the actual damage resulting from the breach of the covenant and all costs, it annuls the forfeiture. Where the forfeiture is of a sum of money, it holds that the covenantee is entitled to sue the person liable only for the actual damage resulting from the breach. These principles of relief have been in some cases modified by statute.

The court has not been so liberal in holding forfeitures of specific property as in holding forfeitures of sums of money to be penalties.¹ This arises, partly at any rate, from the fact that in the nature of things it is more difficult to apply the rules distinguishing penalties from liquidated damages to specific property of uncertain value than to sums of money.

ARTICLE 115.

Rules for distinguishing Penalties and Liquidated Damages.

(1) When the covenant or condition or one of the covenants or conditions to which a forfeiture is annexed, is for the payment of a sum of money to the covenantee, the forfeiture is in the nature of a penalty.

(2) When the forfeiture is annexed only to one covenant or condition, and that covenant or condition is for the doing or not doing of something else than paying a sum of money to the covenantee, and is one the breach of which would cause uncertain damage, then the forfeiture is in the nature of liquidated damages.

(3) When a forfeiture is of a sum of money, and is payable on the breach of one or all of

¹ See next Article.

several covenants or conditions, and the damage resulting from the breach of these would vary substantially, but would in all of them be incapable of precise ascertainment, then if the sum payable on breach is not unconscionable the forfeiture will be held to be in the nature of liquidated damages.

(4) The fact that the forfeiture is described in the contract as a penalty, or as liquidated damages, though a fact to be considered by the court in determining whether it is or is not a penalty, is not decisive of that question.

Paragraph (1).

This rule may be said to be without exception or limitation. Whether the forfeiture arises under a mortgage, a lease, a bond, or a simple contract, the forfeiture, either of an interest in property or a larger sum of money than that secured by the condition or covenant, will be held to be in the nature of a penalty, and will be relieved against.

Thus, in a mortgage equity has for ages relieved against the forfeiture of the mortgaged estate, which by law takes place when the mortgagor fails to pay the mortgage debt on the day fixed for its payment.¹

Then in a lease equity in the same way has long relieved against the forfeiture of the lease for the failure of the lessee to pay the rent reserved on the proper day. Formerly, the jurisdiction of the court to give relief was indefinite. Now by sections 210 and 212 of the Common Law Procedure Act, 1852,² application for relief must be made at the latest within six months after judgment in ejectment has been obtained. Further, the lessee must, on the application, tender all rent due and costs. On the other hand, no forfeiture for non-payment of rent is to arise except demand is expressly made for the rent on the last day on which it is payable. But the demand is not

¹ See *infra*, Art. 117.

² 13 Halsbury's Statutes 154, 155.

necessary where the lease expressly provides otherwise, or where half a year's rent is due and there is no sufficient distress on the premises.

Forfeiture of leases for breaches of conditions to pay rent were the only forfeitures of leases against which equity relieved. Now, however, by section 146 of the Law of Property Act, 1925,¹ a lessee may apply to the court for relief against forfeiture if the lessor is proceeding to enforce a right of re-entry for breach of any covenant or condition in the lease. But such relief cannot be obtained if the lessor has actually recovered possession of the property, whether by entry or action.²

Independently of statute, the rule applies to all indentures and contracts. And it applies equally when the forfeiture is annexed to several conditions, some of which are for securing the doing of other things, if any of them are for securing the payment of a smaller sum of money.³

Paragraph (2).

This rule also seems to be without exception or limitation, unless it be where the sum reserved is so exorbitant as to make it impossible to believe that it was intended to be liquidated damages.⁴

In one case the appellants had contracted to build certain warships for the Spanish Government. There was a clause in the contracts fixing the dates for the delivery of each ship, and placing a "penalty" of £500 per week for each ship which was delivered later than such dates. There was considerable delay in the delivery of all the ships. The Spanish Government paid the contract price and then sued for the amount of such "penalties" as liquidated damages. It was held that it was entitled to recover them in full.⁵

¹ 15 Halsbury's Statutes 325.

² *Rogers v. Rice*, [1892] 2 Ch. 170; 31 Digest 489, 6362.

³ *Re Newman* (1876), 4 Ch. D. 724; 4 Digest 308, 2887.

⁴ *Per Lord DAVEY in Clydebank Engineering and Shipbuilding Company v. Don Jose Ramos Yzquierdo y Castaneda*, [1905] A. C. 6, at p. 17; 17 Digest 137, 424.

⁵ *Clydebank etc. Co. v. Don Jose etc.*, *supra*.

Paragraph (3).

The rule formerly was that "where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of any of them, that must be considered as a penalty."¹ Now it has been modified as stated in the Article by the decision of the House of Lords in *Dunlop Pneumatic Tyre Company v. New Garage and Motor Company*.²

It was laid down by Lord WATSON, in *Lord Elphinstone v. Monkland Iron and Coal Company*³: When a single lump sum is made payable by way of compensation on the occurrences of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification. This statement of the law seems still accurate provided emphasis is put upon trifling damage. A large forfeiture for a breach which could result in no appreciable damage is unconscionable and will not be enforced. Every case, as said by Lord PARKER in *Dunlop Pneumatic Tyre Company v. New Garage and Motor Company*,⁴ must be judged on its merits, but *prima facie* a forfeiture incurred for the breach of one of several covenants is, if reasonable, to be considered liquidated damages.

In *Diestal v. Stevenson*,⁵ a forfeiture which clearly came within this principle was held by BIGHAM, J., to be liquidated damages apparently on the ground that that was the intention of the parties. It is submitted that the true test is whether the circumstances show that the parties really tried to make a pre-estimate of damages or

¹ Per Lord COLERIDGE, C.J., in *Magee v. Lavall* (1874), 9 C. P. 107, at p. 111; 17 Digest 142, 450. But see *Wallis v. Smith* (1882), 21 Ch. D. 243; 17 Digest 79, 12; *Wilson v. Love*, [1896] 1 Q. B. 626; 17 Digest 137, 423.

² [1915] A. C. 79; 17 Digest 138, 426.

³ (1885), 11 App. Cas. 332, at p. 342; 17 Digest 146, 483.

⁴ *Supra*.

⁵ [1906] 2 K. B. 345; 17 Digest 140, 441.

merely meant to punish for the breach.¹ Where punishment was intended the court relieves notwithstanding the intention of the parties. In other words, it will not permit them to contract in that way.

It is to be noted that this rule applies only when the forfeiture is of a sum of money, not of specific property. Where it is of specific property, the court will judge whether the forfeiture is a penalty or not in respect to each covenant to which it is annexed. Thus, it is the custom in a lease to put in a general clause forfeiting the lease on the breach of any of the covenants contained in it, including the covenant to pay rent. The forfeiture here in regard to the payment of rent will be treated in equity as in the nature of a penalty and relief given, but in regard to the other covenants and conditions as in the nature of liquidated damages.

Paragraph (4).

In the words of Lord ESHER, M.R., in *Willson v. Love*,² "A succession of judges have held that the use of the term 'penalty' or 'liquidated' damages is not conclusive; but no case, I think, declares that the term used by the parties themselves is to be altogether disregarded; and I should say that where the parties themselves call the sum made payable a 'penalty,' the onus lies on those who seek to show that it is to be payable as 'liquidated damages.'"

That the use of the term "penalty" or "liquidated damages" is not conclusive is sufficiently evident from the foregoing cases. Thus, in *Clydebank Engineering and Shipbuilding Company v. Don Jose Ramos Yzquierdo y Castaneda*,³ where the forfeiture was held to be liquidated damages, it was described in the contract as a penalty, and in *Re Newman*,⁴ where it was held to be a penalty, it was described in the contract as liquidated damages.

¹ See *Commissioner of Public Works (Cape of Good Hope) v. Hills*, [1906] A. C. 368; 17 Digest 138, 425.

² *Supra*.

³ *Supra*.

⁴ *Supra*.

BOOK I (C).

Section II. Mortgages and Liens.

CHAPTER 1.

NATURE OF A MORTGAGE.

SUMMARY.

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ARTICLE 116.

Definition of a Mortgage.

(1) A mortgage for the purposes of this section may be defined as an assurance of a proprietary interest in land by a borrower (who is called the *mortgagor*) to a lender (who is called the *mortgagee*) made for the purpose of securing the repayment of a loan (which is called the *mortgage debt*) and conditioned expressly or impliedly to become absolute on the failure of the borrower to repay the loan.

(2) When the proprietary interest assured is a legal interest the mortgage is called a *legal mortgage*. When it is an equitable interest it is called an *equitable mortgage*.

(3) A mortgage made by a mortgagee is called a *sub-mortgage*. A mortgage where each of

several mortgagees advances a share of the loan is called a *contributory mortgage*.

Paragraph (1).

It is to be noted that the summary of the law contained in this section is limited to mortgages of land. Mortgages are also made of choses in possession, but the law as to these is now contained in the Bills of Sale Acts, 1878 and 1882, and forms no part of equity. Again, there are mortgages of choses in action. The law as to these seems to be the same, so far as applicable, as that relating to mortgages of land,¹ save that sometimes the right of foreclosure does not apply,² and there is an implied right of sale to be reasonably exercised on the mortgagor making default of payment.³

In order that a transaction may amount to a mortgage it must transfer to the lender a proprietary interest in the land. This is what distinguishes a mortgage from a pledge and a lien. In a pledge only the possession of the thing pledged passes. Mortgage (in Latin *mortuumvadium*; in French *mortgage*) in reality means a pledge, but pledges (in the present sense of the word) of land, if they ever existed, are now unknown. Pledges of chattels are, however, common enough. These are now, when the article pledged is of small value, within the Pawnbrokers Act, 1872. Liens, on the other hand, transfer no proprietary interest to the person entitled to them.

A mortgage must not merely transfer a proprietary interest, but it must transfer it as security for a loan. This is what distinguishes a mortgage from a conditional sale. The importance of this distinction will appear from the note to the next Article.

A mortgage must also be an assurance conditioned to become absolute on failure to pay the mortgage debt. It was this condition which gave equity the opportunity

¹ *Salt v. Marquis of Northampton*, [1892] A. C. 1; 35 Digest 352, 954.

² *Infra*, Art. 135.

³ *Deverges v. Sandeman, Clark & Co.*, [1901] 1 Ch. 70; 35 Digest 497, 2272; *Stubbs v. Slater*, [1910] 1 Ch. 632; 35 Digest 497, 2274.

of interfering. As was pointed out in dealing with Relief against Forfeiture, the forfeiture of the mortgaged land on the mortgagor's failure to pay a mere money debt was by the rules of equity a forfeiture in the nature of a penalty. Equity therefore, in accordance with its principles, relieved against it. This point, too, will be considered further in the note to the next Article.

There are some mortgages which do not result in forfeiture on failure to pay. As has been pointed out, mortgages of choses in action, or indeed of choses in possession, only confer a right of sale. Sometimes there are mortgages of land made by way of power of sale which give rise to no forfeiture. These are of too little importance to be separately considered in a work like this. For practical purposes, when one speaks of a mortgage of land one always means a mortgage of the nature described in the Article.

When mortgages were made by conveyance of the mortgaged property to the mortgagee there could be only one mortgage of the same legal estate in the land. When such a mortgage was made the maker ceased to have any legal interest in the land. Any interest which remained in him was one recognised only in equity, and so any second or third mortgages must in the nature of things be equitable only. Under the present law, as we shall see, all mortgages of legal estates are made not by conveyance but by lease or underlease or by a charge which has the same effect as a mortgage by lease or underlease. The results of this are that the mortgagor remains after a mortgage the legal owner of the land subject to the lease or sublease granted to the mortgagee and the mortgagees themselves may all take legal interests in the land mortgaged whether their mortgages are first or subsequent.

At the same time equitable mortgages are still possible and are frequently encountered in practice. Equitable mortgages may arise because the mortgagor has only an equitable interest to transfer, as in the case of a cestui que trust mortgaging his interest under the trust. They may also arise owing to the form of assurance used in effecting the mortgage being such as equity only recognises. To create a legal mortgage of land a deed must be used, as

nothing else will transfer the legal title to an interest in land, however small. But an equitable interest (other than an equitable estate in tail) may be transferred by mere writing unsealed, or when it does not arise under a trust, even without writing. Thus a usual way of creating an equitable mortgage is by depositing the title-deeds of the property to be mortgaged with the lender. This creates a good mortgage in equity.¹ In general the incidents of these mortgages are the same—so far as equity is concerned—as the incidents of mortgages created by deed, but it will be observed that most of the powers given by statute relate only to mortgages by deed.²

Paragraph (3).

Thus if A. mortgages land to B. and B. afterwards mortgages it to C. the mortgage to C. is a sub-mortgage. If, on the other hand, B. and C. each advanced half of the mortgage loan to A., this mortgage would be a contributory mortgage.

Trustees are not permitted to advance trust money jointly with others on a contributory mortgage, because by so doing they put it beyond their power to call in the trust money without the concurrence of the other mortgagees.³

ARTICLE 117.

The First Essential Characteristic of a Mortgage.

(1) The first essential characteristic of a mortgage is the mortgagor's *right to redeem*.

(2) By the mortgagor's right to redeem is meant that a mortgagor, notwithstanding any condition or stipulation to the contrary contained in the mortgage agreement, is entitled,

¹ *Russel v. Russel* (1783), 1 Bro. C. C. 269 ; 35 Digest 256, 150.

² *Infra*, p. 374.

³ *Stokes v. Prance*, [1898] 1 Ch. 212 ; 35 Digest 293, 459.

on repaying the mortgage debt with interest and costs and discharging any other legal obligation forming part of the consideration for the mortgage, to call upon the mortgagee to re-transfer to him the mortgaged interest and to discharge him and it from all legal obligations arising out of the mortgage agreement.

(3) The right to redeem is inchoate until the time for repaying the mortgage debt, according to the mortgage agreement, arrives. It then becomes complete. In a legal mortgage, if it is not exercised immediately it becomes complete, it is lost at law for ever. But in equity, whether the mortgage be legal or equitable, the right to redeem continues until it is determined in some of the ways hereinafter stated, and it is known as the mortgagor's *equity of redemption*.

Paragraphs (1) and (2).

The principle stated here is usually summed up in the maxim "once a mortgage always a mortgage." By this is meant that once it is shown that a transfer of an interest in property was intended as security for the repayment of a debt, then no condition or stipulation introduced into the transaction will be permitted to turn it into a conditional sale¹ or otherwise prevent the mortgagor from getting back his property free from obligation on his repaying the mortgage debt.² In the words of Lord MACNAGHTEN in *Bradley v. Carritt*,³ "Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption." Any such device or contrivance is called a *clog on the right to redeem*.

A statutory exception has been made to this rule. A debenture is a mortgage of a joint stock company's property or undertaking. By section 74 of the Companies

¹ See note to paragraph (3).

² See *Samuel v. Jarrah Timber and Wood Paving Corporation*, [1904] A. C. 323, at p. 329; 35 Digest 353, 957.

³ [1903] A. C. 253, at p. 261; 35 Digest 354, 971.

Act, 1929,¹ a condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the commencement of the Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

The following points should be noted with regard to clogs :

(1) The stipulation in order to be a clog must be contained in the mortgage deed itself or be contemporaneous with it so as to form part of the mortgage agreement. The ground on which a Court of Equity held any stipulation giving the mortgagee a greater right than the right to have his debt repaid at the date fixed for redemption to be invalid was based on the view that mortgagor and mortgagee were not dealing on equal terms. The mortgagor was presumably in need of money, the mortgagee in possession of money. Therefore equity interfered to protect the weaker party—as it often did. Once, however, the mortgage is made the mortgagor has got the money he wants. If he chooses subsequently by a new agreement to release his right of redemption to the mortgagee, there arises no ground of relief from such agreement.²

(2) A stipulation postponing the right to redeem for a reasonable time is no clog on the right of redemption. The usual period fixed for repayment of the mortgage debt is the first date upon which interest on the mortgage debt becomes payable—that is, six months or three months after the date of the mortgage. But not infrequently there is a stipulation that the mortgagor shall not redeem until a much later date. Such a stipulation, if reasonable, is quite proper.³ In *Morgan v. Jeffreys*,⁴ a stipulation that the mortgagor should not redeem until the elapse of twenty-eight years from the date of the mortgage was held unreasonable and void. And the same point was

¹ 2 Halsbury's Statutes 891.

² *Reeve v. Lisle*, [1902] A. C. 461 ; 35 Digest 357, 1003.

³ *Biggs v. Hoddinott*, [1898] 2 Ch. 307 ; 35 Digest 356, 993.

⁴ [1910] 1 Ch. 620 ; 35 Digest 301, 510.

upheld in *Fairclough v. Swan Brewery Company, Limited*,¹ where in a mortgage of a leasehold property the right to redeem was not to be exercised until a date almost immediately before the expiration of the lease. It would appear, however, that the length of time for which redemption is postponed is not in itself the sole criterion of reasonableness; and even a lengthy postponement may be held to be reasonable if it is the result of a free bargain between independent parties.²

(3) A stipulation which gives the mortgagee during the continuance of the mortgage a right to other advantages (called *collateral advantages*) besides the mere payment of interest on the mortgage debt is, if fair and reasonable, not a clog on the right to redeem. Thus, where in the mortgage of a public-house there was a condition in the mortgage deed that the mortgagor would buy the beer sold on the mortgaged premises from the mortgagee during the continuance of the mortgage, this condition was held good.³ But every collateral advantage is regarded with suspicion, and if it is not fair and reasonable it is void *ab initio*.⁴

(4) Formerly it was assumed as an axiom of equity that any stipulation which gave a right to the mortgagee against the mortgagor himself, or against the mortgaged property, after the mortgagor had paid off the full mortgage debt with interest and costs, was a clog on the equity of redemption. Thus, where a brewer advanced money on mortgage to a publican and there was a stipulation that whether the mortgage debt was meanwhile paid off or not the publican would continue for a certain period to buy his beer for sale in the mortgaged inn from the brewer, it was held that after the mortgage debt was discharged the publican was no longer bound by the stipulation.⁵

¹ [1912] A. C. 565; 35 Digest 353, 958. See also *Davis v. Symons*, [1934] Ch. 442; Digest Supp.

² See *Knightsbridge Estates Trust, Limited v. Byrne*, [1938] 4 All E. R. 618; Digest Supp. This decision, which is likely to be appealed, may be a leading case on the subject of reasonableness.

³ *Biggs v. Hoddinott*, *supra*.

⁴ *James v. Kerr* (1889), 40 Ch. D. 449; 35 Digest 314, 595.

⁵ *Noakes & Co., Limited v. Rice*, [1902] A. C. 24; 35 Digest 241, 19. See also *Bradley v. Carritt*, [1903] A. C. 253; 35 Digest 354, 971.

In that and other cases words were used by the judges which gave rise to the view that any stipulation would be regarded as a clog if it was intended to bind the mortgagor after the property had been redeemed. The words used, however, were *dicta* and it would seem that the view which has been based upon them is rather too wide. At all events, in the more recent case of *Kreglinger v. New Patagonia Meat Company, Limited*,¹ the House of Lords did uphold a stipulation for a collateral advantage which was capable of continuing after the mortgage had been paid off. In that case the plaintiffs lent to the defendant company £10,000 secured by a floating charge on the company's undertaking. It was agreed that if the defendants discharged all their obligations under the mortgage, the plaintiffs would not call in the loan for a period of five years, although, it should be noted, there was nothing to prevent the defendants, if they wished, from paying off the loan before that period had expired. It was also agreed that for a period of five years from the date of the loan the plaintiffs should have the option to purchase all the sheepskins at the defendants' disposal so long as the plaintiffs were willing to pay for them the best price offered by any other person. The defendants repaid the loan with interest within two and a half years and then claimed that they were no longer bound by the stipulation giving to the plaintiffs the option to purchase the sheepskins. The House of Lords held, however, that the plaintiffs could continue to exercise the option for the full period of five years.

It has been stated that this decision is in conflict with the earlier cases referred to above,² and since they are all decisions of the House of Lords some confusion has resulted. It would seem, however, that they can be reconciled on the basis that the sole test of the validity of a collateral stipulation is whether or not it is reasonable. The fact that the collateral advantage is capable of sub-

¹ [1914] A. C. 25 ; 35 Digest 241, 20. See also *Re Cuban Land Co.*, [1921] 2 Ch. 147 ; 10 Digest 782, 4896.

² This view was taken by the late Dr. Strahan in earlier editions of this work. The reasons which have led the present editor to dissent from it are indicated in the text.

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sisting after the security had been discharged may be a material factor to be taken into consideration in deciding whether a stipulation is reasonable or not. In the case of licensed premises, for instance, a "tie" is so restrictive of the user of the property that there is a substantial difference in commercial value between a "tied house" and a "free house." The same may be true of many other businesses. But, as in practically all cases where the question of the reasonableness of a transaction arises, we must not isolate one particular aspect but must regard the whole transaction. In other words, the purported duration of the collateral advantage must be considered. But it must be considered in relation to the whole transaction. The essential question is whether the transaction as a whole is reasonable. In the *Kreglinger Case*, it would appear, the collateral advantage was good because the defendants obtained such substantial advantages in return for it as to make the transaction a reasonable one between the parties.¹

It should be noted, however, that whether or not the collateral benefit given to the mortgagee determines with the mortgage, the courts regard it with suspicion. If it is not reasonable they will treat it as being induced by the oppression of the mortgagee, and will hold it voidable.²

(5) Lastly, a stipulation giving the mortgagee a collateral benefit, even though exercisable only during the continuance of the mortgage, is a clog if the effect of its exercise will be to prevent the inchoate right to redeem ever becoming complete. Thus, in *Samuel v. Jarrah Timber and Wood Paving Corporation, Limited*,³ a limited company mortgaged some of its debenture stock to S. The mortgage debt was to be paid off at any time after thirty days' notice on either side. The mortgage agreement gave the mortgagee the right to purchase the mortgaged stock at forty per cent. at any time within twelve months. Within the twelve months

¹ See also the more recent case of *Knightsbridge Estates Trust, Ltd. v. Byrne*, *supra*.

² *James v. Kerr* (1889), 40 Ch. D. 449; 35 Digest 314, 595.

³ [1904] A. C. 323; 35 Digest 353, 957.

and before any notice to pay off the mortgage debt had been given, the mortgagee exercised his option to purchase the mortgaged stock. It was held that the stipulation was void and the company was entitled to redeem.

Paragraph (3).

The right to redeem is an essential characteristic of a mortgage—that is, a transaction cannot be a mortgage without it. But a transaction may give a right to redeem and yet not be a mortgage. Thus, a conditional sale gives the vendor a right to redeem, yet a conditional sale is not a mortgage. The difference between them is that a mortgage is based on a loan, a conditional sale upon a price. Wherever the person to whom the property is transferred can sue the transferor for debt in case the transferor fails to redeem, the transaction is a mortgage.

As we shall see, the law did not distinguish at one time between mortgages and conditional sales. In both cases it regarded the transaction as an out-and-out conveyance, subject to a condition to reconvey on payment of a certain sum of money. This condition, like all legal conditions, had to be strictly observed. If it were not fulfilled by the payment of the money on the day it was to be paid, the right to redeem was gone for ever. Equity sharply distinguished. It refused to help the vendor on a conditional sale. A vendor is just as well able to look after himself as a purchaser, or is supposed to be till the contrary is shown, and so it was assumed that he had secured the fair price of his property. Accordingly, if he did not repurchase it when he had a chance, the court held his right to repurchase was gone. But a borrower was always regarded in equity as bargaining with a lender on unequal terms. It was assumed, therefore, that the amount he received on the security of his property was not its full value—an assumption generally right. Accordingly to deprive him of his property for failing to repay the loan on the precise day was not merely a penalty in the technical sense, but a real injustice. On this ground equity intervened, and held that the mortgagor should have still a reasonable time after the legal forfeiture

to redeem his estate. The next Article shows the limitation which is put on this continuance of the right to redeem.

Conditional sales are still occasionally made and are still strictly enforced, provided it can be shown that they are in fact sales and not in fact securities for repayment of debts. As a rule, no questions now arise on this point, as a mortgage is always drafted in a form that clearly shows it was intended to be a mortgage. Where any such question does arise, the points the court will consider in deciding it are chiefly these: (a) Who paid the costs of the transaction? The practice is that the mortgagor pays them where the transaction is a mortgage and the purchaser where it is a sale. (b) Did the grantee take possession immediately? In mortgages the grantee seldom takes immediate possession; in sales the purchaser usually does. (c) Did the grantee, when he took possession, keep accounts of rents and profits? In mortgages, the mortgagee in possession must keep accounts, but, of course, in sales, the purchaser is under no such obligation. (d) Was the consideration given adequate as the price of the property or not? ¹

Though the right to redeem is inchoate until the time fixed for the repayment of the mortgage debt arrives, yet if the mortgagee before that time brings an action for the possession of the mortgaged land, the mortgagor is entitled to redeem at once. When no time is fixed for the repayment—which rarely happens except when the mortgage is by deposit of title-deeds—the right to redeem is complete from the first.

The right to redeem after the time fixed for redemption has passed exists notwithstanding any custom of trade to the contrary.²

¹ *Per* Lord CRANWORTH in *Alderson v. White* (1858), 2 De G. & J. 97, at p. 135; 35 Digest 246, 61. See also *Re George Inglefield, Ltd.*, [1933] 1 Ch. 27; Digest Supp.

² *Ponsolle v. Webber*, [1908] 1 Ch. 254; 42 Digest 817, 278.

ARTICLE 118.

The Second Essential Characteristic of a Mortgage.

(1) The second essential characteristic of a mortgage is the mortgagee's *right to foreclose*.

(2) By the mortgagee's right to foreclose is meant that when the mortgagor's right to redeem has become complete, and he has failed to exercise it, the mortgagee is entitled to apply to the court for an order directing the mortgagor to redeem within a certain time, or in default be deprived for ever of his right to do so.

(3) Such an order is called an *order of foreclosure*.

When equity decided not to permit the mortgaged property to be forfeited merely because the mortgagor failed punctually to repay the mortgage debt, it never intended to deprive the mortgagee permanently of this remedy. Accordingly it gave him the right to foreclose described in the text, and so to appropriate to himself the mortgaged property towards the satisfaction of the mortgage debt.

This right to foreclose is simply then the right to ask the court to withdraw its relief against a forfeiture which is created by the mortgage.¹ Where there is a forfeiture, no stipulation in the mortgage deed can prevent the right to foreclose arising upon default in payment, though the court now in an action of foreclosure can, if it sees fit, direct a sale of the mortgaged property instead. The exercise of this right to foreclose is discussed in a later article.

¹ *Williams v. Morgan*, [1906] 1 Ch. 894; 35 Digest 547, 2761.

BOOK I (C) (II) : MORTGAGES AND LIENS (*continued*).

CHAPTER 2.

POSITION OF PARTIES UNTIL REDEMPTION OR FORECLOSURE.

SUMMARY.

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ARTICLE 119.

Mortgages at Law and in Equity.

(1) At common law, a legal mortgage of a fee simple being regarded as a conveyance subject to a condition of repurchase and a legal mortgage of a term of years being regarded as an assignment subject to a similar condition, after the mortgage all that remained in the mortgagor was the benefit of such condition, which carried with it no interest in the land mortgaged.

(2) In equity, a mortgage being regarded as a mere mode of securing a debt, after the mortgage all the interest in the mortgaged land remained in the mortgagor, subject to the mortgage debt. This interest was called his *equity of redemption*.

(3) Under the modern law all mortgages of land, whether held in fee simple or on lease, are to be made or deemed to have been made by lease or (as the case may be) by sub-lease. The result is that after the mortgage the mortgagor still has vested in him the legal ownership of the fee simple or (as the case may be) of the leasehold interest which he has mortgaged, whilst the mortgagee has the legal ownership of the term or sub-term which the mortgage deed has vested in him. This change in the method of effecting a mortgage has not abolished the mortgagor's equity of redemption. Until the date fixed by the mortgage deed for repayment arrives the mortgagor has a legal or contractual right to redeem, and after that date he has his equity of redemption, which entitles him to redeem the interest—either leasehold or sub-leasehold—which has been vested in the mortgagee by the mortgage.

Paragraphs (1) and (2).

Formerly a mortgage was effected by the mortgagor conveying or assigning to the mortgagee the whole of his (the mortgagor's) interest in the land, subject to a proviso for re-conveyance or re-assignment on repayment of the money lent with interest on a date fixed by the mortgage deed. It became usual, in practice, to make this date six months after the date of the execution of the mortgage deed, and despite the change in the form of mortgage which has been indicated in paragraph (3)

above, it is still usual in a mortgage deed for the mortgagor to covenant to repay the money lent, with interest, six months after the date of the deed. This serves a useful purpose because, as we shall see, statute gives to a mortgagee under a mortgage made by deed certain rights and remedies for the purpose of enforcing his security "when the mortgage money has become due"; and by fixing the date for repayment six months after the date of the deed it is possible to put the mortgagee in a position to exercise these rights and remedies, if circumstances so warrant, at an early date. On the other hand, a mortgage is rarely intended to secure so temporary an accommodation as a loan for so short a period as six months; and the difference between the attitude of the common law and the attitude of equity became apparent when, as usually happens, the date fixed by the mortgage deed for repayment was allowed to pass without repayment being made. The common law regarded a mortgage as being a conveyance to the mortgagee subject to a condition for the mortgagor to repurchase on the date fixed. If, therefore, the mortgagor allowed that date to pass without repaying—*i.e.* repurchasing—the estate of the mortgagee became absolute. But equity, it was said, looked to the substance rather than to the form of a transaction, and held that a mortgage, though in form a conveyance on condition, was in substance nothing more nor less than a security for the repayment of a loan. Equity held, therefore, that so long as the mortgagee received what was due to him for principal, interest and costs he suffered no hardship in being compelled to reconvey to the mortgagor. Consequently, the mortgagor received his equity of redemption, and equity allowed him, on payment of what was due to the mortgagee for principal, interest and costs, to redeem even after the date fixed by the deed had passed.

It was not, however, until the middle of the eighteenth century that it was finally decided what the nature of a mortgagor's right in equity was. It was then held in *Casborne v. Scarfe*,¹ that it was an equitable

¹ (1737), 1 Atk. 603; 35 Digest 343, 853.

estate in the land just as much as the interest of a cestui que trust under a declared trust. Indeed, the mortgagee is a constructive trustee of the land for the mortgagor, using that term in the wide sense.¹ While the mortgagor is left in the possession of the land this is of no importance, but as soon as the mortgagee enters on the land, it will be seen that many of the duties of an ordinary trustee are immediately imposed upon him. His position then is that of a constructive trustee with a beneficial interest in the trust property.

The equity of redemption being then an ordinary equitable estate in the land, the rules laid down in Article 17 apply to it.

Paragraph (3).

This new enactment, which was made by the Law of Property Act, 1925, is really nothing more than a reversion to the old practice under which mortgages of fees simple were made by long leases without rent reserved instead of being made as they were after the Conveyancing Act, 1881, by conveyance of the freehold. The object of making mortgages of fees simple by lease was to ensure that the right to receive the mortgage debt and the right to reconvey the mortgaged land to the mortgagor should, if the mortgagee died intestate, vest in his administrators. The old practice has now been revived not for that object, since under the Administration of Estates Act, 1925, realty and personalty devolve in the same way, but rather to secure the free alienation of the mortgagor's interest. Under a conveyance of a fee simple subject to a mortgage all that could pass was an equitable estate. Now it is the legal fee simple subject to the mortgage; and so a purchaser of it is not affected by equities of which he had not notice when he purchased.

There is really no change as to mortgages of leaseholds which have been made as a rule not by assignment but by sub-lease, the object being to free the mortgagee from

¹ Article 10, *supra*.

liability in regard to covenants and conditions contained in the lease until he took possession. Thus the mortgagor's interest in the land mortgaged was a legal interest ; that is, the mortgagor after the mortgage continued to be the lessee of the land, the mortgagee being a sub-lessee holding from him.

Under the new law a mortgage of fee simple is now to be made or to be deemed to be made by a lease for three thousand years without rent, without liability for waste and with a condition for cesser on the repayment of the loan. Where a second mortgage is made a new lease is granted to the second mortgagee for the unexpired term of the first mortgagee, and one day more, and the same rule is applied to all subsequent mortgagees. In the case of leasehold the first mortgagee is to take or be deemed to take a sub-lease of the mortgaged land subject to the conditions contained in the mortgagor's lease for a term ten days less than the unexpired term of the mortgagor. Subsequently mortgagees take terms first nine days less than the first mortgagee's term and the next eight days less and so on.¹

But although both mortgagor and mortgagee thus may have legal estates in the property mortgaged, the mortgagor's equity of redemption has not, as might at first be thought, disappeared. It is still the invariable practice in a mortgage deed for the mortgagor to covenant to repay the money lent, with interest, on a specified date ; and it is still customary for that date to be six months after the date of the execution of the mortgage deed. Until that date arrives the mortgagor still has a legal right to redeem, and if he allows that date to pass without making repayment, so that his legal right to redeem is lost, his equity of redemption still entitles him to redeem on payment or tender of what is due from him for principal, interest and costs. The only important difference is that instead of redeeming, as he did formerly, the legal estate in fee simple, he redeems the term of years which he has vested in the mortgagee. But beyond that there is no essential change in the nature of the equity of redemption, and the rules

¹ Law of Property Act, 1925, sect. 85 (15 Halsbury's Statutes 263).

which have already been discussed, such as the rule which renders void any attempt to clog it, are still applicable.

ARTICLE 120.

Position of the Mortgagor.

(1) Where after a legal mortgage the mortgagor remains in possession of the mortgaged land, he is tenant to the mortgagee.

(2) Though only a tenant of the mortgagee nevertheless the mortgagor in possession is entitled—

- (i) To receive all the rents and profits of the land and keep the same for his own use without in any way accounting for them to the mortgagee.
- (ii) To sue for the possession of the mortgaged land and for any rent or profit arising out of it or for any injury done to it, in his own name only, unless the cause of action arises under a lease or contract made by him and another person jointly.
- (iii) To commit deteriorating waste on the mortgaged land unless the land is so scanty a security for the mortgage debt that the waste endangers it.
- (iv) To grant leases of the mortgaged land, but unless he has express or statutory powers so to do such leases are not binding on the mortgagee.

(3) Where a mortgagor remains for twelve years in possession of the mortgaged land without paying any interest on the mortgage debt

and without giving any written acknowledgment of the mortgagee's title, the title of the mortgagor to the land is extinguished.

Paragraph (1).

This position was more obvious when, as formerly, the legal estate in fee simple was vested in the mortgagee. But the position is still the same, despite the recent change in the form of a mortgage; for the mortgagee, in virtue of the term of years which is vested in him, still has a legal right to immediate possession and, therefore, if the mortgagor remains in possession, as he usually does, he does so as tenant of the mortgagee.

The nature of the tenancy depends on whether or not the mortgagor has attorned tenant to the mortgagee; that is, in effect, acknowledged the mortgagee as his landlord. If he has so attorned he is a tenant at will; if he has not, he is a tenant on sufferance. At one time it was the practice to insert an attornment clause in almost every mortgage. The effect was that, since the relation of landlord and tenant was created, the mortgagee, as landlord, could recover arrears of interest by distress. This use of an attornment clause, however, is rarely possible in modern times, because it has been decided that an attornment clause which is intended to give to the mortgagee a power of distress is a bill of sale within the meaning of the Bills of Sale Acts.¹ To be valid a bill of sale must be in the form given in the Schedule to the Bills of Sale Act, 1882,² and it would be very difficult to combine that form with the form of an ordinary mortgage of land. Nevertheless, an attornment clause is inserted not infrequently in modern mortgages; because, although it may be invalid as a bill of sale conferring a power of distress, it is still valid for the purpose of creating the relation of landlord and tenant;³ and that relation enables the mortgagee, if he

¹ *Re Willis, Ex parte Kennedy* (1888), 21 Q. B. D. 384; 5 Digest 962, 7882.

² 2 Halsbury's Statutes 81.

³ *Mumford v. Collier* (1890), 25 Q. B. D. 279; 35 Digest 330, 735.

wishes to recover possession of the land, to sue by specially indorsed writ under Order III, rule 6, and obtain speedy judgment under Order XIV, rule 1.¹

Paragraph (2).

(ii) Before the Judicature Act, 1873, the position of a mortgagor in possession was this. As regards tenancies of the mortgaged land which commenced before the mortgage, he could not sue without joining the mortgagee as legal owner. He could distrain for arrears of rent, as the court held he had an implied authority to do so. As regards tenancies which commenced after the mortgage, he could sue in his own name. The ground of the distinction was that the former tenants could deny his right to sue, while the latter could not, without questioning his title to create the tenancy—a thing which no tenant is entitled to do. In the first case the tenant had ceased to be his landlord since he had parted with the ownership of the land. In the second case any right to the land which the tenant obtained under the lease was derived from the mortgagor and so he could not question the mortgagor's title without impugning his own. The distinction between these two cases ceased to have any importance after the Judicature Act, 1873,² and nowadays section 98 of the Law of Property Act, 1925,³ enacts that a mortgagor for the time being entitled to the possession or receipt of the rents and profits of any land, as to which the mortgagee has not given notice of his intention to take possession or to enter into receipt of the rents and profits thereof, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

(iv) Leases granted by a mortgagor in possession were good against himself. But as against the mortgagee, who

¹ *Kemp v. Lester*, [1896] 2 Q. B. 162; 35 Digest 330, 737. See also *Dudley and District Benefit Building Society v. Gordon*, [1929] 2 K. B. 105; Digest Supp.

² Section 25 (5).

³ 15 Halsbury's Statutes 277.

was legal owner, they were not binding unless he was party to them. When the mortgagee took possession he was entitled to repudiate, without notice, leases to which he was not a party.¹ But if he did so and the lease was a beneficial one he might be held responsible for the loss to the mortgaged estate as loss arising through his own wilful default.² If the mortgagee gives the tenant notice to pay the rents for him, or accepts rent, then the tenant becomes his tenant on a tenancy from year to year.³ We shall see, however,⁴ that a mortgagor in possession now has a statutory power (which, however, may be excluded) to grant certain leases which are binding on the mortgagee.

Paragraph (3).

This is independent of the effect of section 8 of the Real Property Limitation Act, 1874,⁵ which applies only to remedies for the mortgage debt. By section 34 of the Real Property Limitation Act, 1833 (explained by the Real Property Limitation Act, 1837), as modified by section 1 of the Real Property Limitation Act, 1874,⁶ twelve years' possession, after the right of the true owner to eject the holder of the land accrued, without payment of rent or interest or written acknowledgment of the true owner's title, extinguishes the title of the true owner and creates a new title in the holder—even where the mortgaged property has been sold and is represented by funds in the hands of trustees or the court.⁷

Where a prior mortgagee has taken possession a subsequent mortgagee cannot, of course, do so without redeeming the prior mortgage; that, however, will not prevent the statute running against the subsequent mortgage.⁸

¹ *Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454; 35 Digest 327, 711.

² See next Article.

³ *Keith v. R. Gancia and Company*, [1904] 1 Ch. 774; 35 Digest 338, 801.

⁴ *Post*, Art. 124.

⁵ After June, 1940, Limitation Act, 1939, section 18.

⁶ After June, 1940, Limitation Act, 1939, sections 4, 12.

⁷ *In re Hazeldine's Trusts*, [1908] 1 Ch. 34; 43 Digest 839, 2359.

⁸ *Johnson (Samuel) & Sons, Ltd. v. Brock*, [1907] 2 Ch. 533; 32 Digest 472, 1356.

ARTICLE 121.

Position of the Mortgagee.

The mortgagee's position after the execution of the mortgage may be summed up under the following heads :—

(1)—(i) Where the mortgage is legal, the mortgagee may take possession of the mortgaged land at any time, but if he takes proceedings to obtain possession the mortgagor may stay such proceedings by paying him the mortgage debt with interest and costs.

(ii) If he takes possession of the mortgaged land he is bound to keep accounts of all the rents and profits received by him and all the outgoings paid by him. He must in such accounts make allowance of an occupation rent for any part of the mortgaged land occupied by him, he is liable for all rents and profits not actually received by him but which he might have received but for his wilful default, he is not entitled to commit waste unless the rents and profits of the mortgaged land are not sufficient to keep down the interest on the mortgage debt, and he is bound to keep the mortgaged land and the buildings on it in repair so far as the surplus rents and profits will allow.

(2) Where the mortgagee has taken possession, if he remains for twelve years in possession without acknowledgment in writing of the

title of the mortgagor or of his right of redemption, the mortgagor's right to redeem is extinguished.

Paragraph (1).

A mortgagee is held to have taken possession when he has done some act which practically deprives the mortgagor of the management or control of the mortgaged property—for example, by giving the tenants of the mortgaged land notice to pay their rents to him.¹ Having once taken possession, the mortgagee cannot abandon possession at his pleasure, but he will be relieved of it if the court appoints a receiver or if he himself appoints one under his statutory power.² Once in possession, he is liable not merely for all the rents and profits he actually receives, but for all he might have received but for his own wilful fault.³ At law he can commit waste or grant leases like any other legal owner, but equity will restrain him from committing waste unless his security is deficient.⁴ After satisfying the outgoings of the estate, and keeping down the interest on his mortgage, he is bound to effect all necessary repairs as far as the surplus income will permit.⁵ If he spends money of his own on permanent improvements, he is not entitled to charge these against the mortgagor. His sole right is that in taking accounts he will be entitled to claim for the expenditure so far as it has enhanced the value of the land.⁶

Not merely is the mortgagee who takes possession bound to do all these duties without remuneration, but by taking possession he makes himself liable upon any onerous covenants affecting the land. The remedy by taking possession

¹ *Heales v. McMurray* (1856), 23 Beav. 401.

² *County of Gloucester Bank v. Rudry Merthyr Colliery Company*, [1895] 1 Ch. 629; 35 Digest 312, 587; *Anchor Trust Co. v. Bell*, [1926] Ch. 805, at p. 817; 35 Digest 512, 2425.

³ *Noyes v. Pollock* (1886), 32 Ch. D. 53; 35 Digest 395, 1379.

⁴ *Millett v. Davey* (1862), 31 Beav. 370; 35 Digest 402, 1437.

⁵ As to devoting surplus income to reducing the mortgage debt, see Article 131.

⁶ *Henderson v. Astwood*, [1894] A. C. 150; 35 Digest 500, 2306.

is, therefore, a double-edged one. To prevent a mortgagee being driven to it, it became customary to insert in mortgage deeds a power enabling the mortgagee to appoint a receiver of the rents and profits of the land who would be the mortgagor's agent, and be paid by commission for his work. As we shall see, power to appoint a receiver is implied now in all mortgages by deed unless a contrary intention appears.

Paragraph (2).

Though the mortgagee in possession is, in a sense, a constructive trustee for the mortgagor, yet by the Real Property Limitation Act, 1874, section 7,¹ the mortgagor's right to recover the land under the circumstances stated is barred. When it is so barred the mortgagee of a fee simple obtains not the ownership of the lease of 3,000 years but the fee simple itself, and in the same way a mortgagee of a leasehold obtains the lease.²

It may be noted here that a mortgagee in possession is always liable to account on the footing of wilful default,³ while a trustee is not liable to account on this footing unless a special order to that effect is made by the court.

ARTICLE 122.

Mortgagee's Personal Remedy against the Mortgagor.

(1) As a mortgage is merely a security for a loan, then, unless the mortgagee has expressly agreed not to hold the mortgagor personally liable, on the loan becoming repayable the mortgagee can sue the mortgagor for its recovery independent of the mortgage.

¹ After June, 1940, Limitation Act, 1939, sect. 12.

² Law of Property Act, 1925, sects. 88, 89 (15 Halsbury's Statutes 267, 268).

³ *Infra*, p. 531.

(2) Where the mortgage deed contains no covenant for the repayment of the mortgage debt, the mortgage debt is a simple contract debt, and, as such, may be barred by six years' non-claim after it becomes payable. Where the mortgage deed does contain a covenant for repayment, it is a specialty debt, and, as such, barrable only after twenty years' non-claim. If, however, the mortgagee's rights as respects the mortgaged land have been barred by twelve years' non-claim then he will not be allowed to recover the mortgage debt by an action on the covenant.

(3) An action for recovering the mortgage debt either in simple contract or on the covenant in no way prejudices the mortgagee's right to foreclose or to secure repayment in any other mode. It may be resorted to before or simultaneously with these other remedies, but if resorted to after a decree for foreclosure it will have the effect of reopening the foreclosure, and if the mortgagee is not in a position to restore the mortgaged lands, it will be estopped.

Paragraphs (1) and (2).

By section 8 of the Real Property Limitation Act, 1874,¹ the remedy by action for money secured on land is barred by the lapse of twelve years since the last payment of interest or principal or the last written acknowledgment of the debt. The remedy on a covenant—that is, a contract under seal—continues for twenty years. But since the remedy in the case of a mortgage is primarily against the land, when it is barred by the statute as against the land the court holds that the personal remedy on the covenant is barred also.²

¹ After June, 1940, Limitation Act, 1939, sect. 18.

² *Sutton v. Sutton* (1882), 22 Ch. D. 511; 35 Digest 239, 4. See also *Charter v. Watson*, [1899] 1 Ch. 175; 32 Digest 317, 33.

Paragraph (3).

The three remedies of a mortgagee are (1) foreclosure, (2) action on the covenant, (3) sale of the mortgaged estate. These three are concurrent, not alternative remedies. The exercise of one of them sometimes renders another impossible. Thus, if the mortgagee sells the mortgaged property, of course he cannot afterwards foreclose the mortgagor's equity of redemption. That went when the mortgagee exercised his power of sale, and for this reason it was once argued that the existence of an express power of sale in a mortgage deed was inconsistent with the right of foreclosure. But the Law of Property Act, 1925,¹ expressly provides that the power of sale implied by it shall not prejudice the right of foreclosure. Subject to this all remedies may be utilised at the same time. Thus a mortgagee may claim in the same writ foreclosure and judgment on the covenant.² Or he may sue on the covenant and foreclose for the unsatisfied balance of his debt.³ But if he forecloses and afterwards parts with the property, he cannot then sue on the covenant, since if he recovered judgment on the covenant he could not restore the mortgaged property on the mortgagor paying the mortgage debt. And on his obtaining a decree *nisi* for foreclosure, he cannot sell under a power of sale without the consent of the court.⁴ And where he brings a foreclosure action in the Chancery Division (in which he is entitled to claim a personal order for payment of principal and interest against the mortgagor) he will not be allowed to issue while the Chancery action is pending a specially indorsed writ in the King's Bench to recover the principal and interest.⁵

¹ Section 103 (15 Halsbury's Statutes 286); formerly section 20 of the Conveyancing Act, 1881.

² *Dymond v. Croft* (1876), 3 Ch. D. 512; 35 Digest 488, 2198.

³ *Rudge v. Richens* (1873), L. R. 8 C. P. 358; 35 Digest 537, 2666.

⁴ *Stevens v. Theatres, Limited*, [1903] 1 Ch. 857; 35 Digest 494, 2249.

⁵ *Williams v. Hunt*, [1905] 1 K. B. 512; 35 Digest 538, 2676.

ARTICLE 123.

Express and Implied Incidents of Mortgages.

Subject to the mortgagor's right to redeem and the mortgagee's right to foreclose, any other incidents in addition to those above mentioned may be attached to a mortgage by express agreement between the mortgagor and mortgagee. Those which formerly it was customary so to attach are now generally implied by statute in all mortgages executed since December 31st, 1881, unless expressly excluded.

ARTICLE 124.

Implied Incidents where Mortgagor or Mortgagee is in Possession.

A. (1) Whether the mortgage is made by deed or not, a mortgagor or mortgagee in possession is entitled to make the following leases, which will, when made by the mortgagor, be binding on the mortgagee, and when made by the mortgagee will be binding on the mortgagor and prior mortgagees :

- (i) An agricultural or occupation lease for any term not exceeding fifty years ; and
- (ii) A building lease for any term not exceeding nine hundred and ninety-nine years.

(2) Every such lease is to be made at the best rent reasonably obtainable, and to take effect in

possession not later than twelve months after its date ; and building leases are to be in consideration of the lessee having erected or agreeing to erect or repair buildings within five years, and having executed or agreeing to execute within that time an improvement on the land, and a peppercorn rent may be reserved in such lease during the first five years.

(3) This power does not enable a lease to be granted which the mortgagor could not have granted had he not mortgaged his land, and it is implied only if and in so far as no contrary intention is expressed in the mortgage deed, or otherwise in writing.

(4) Where the lease is by the mortgagor he must within one month after making the lease deliver to the mortgagee a counterpart of the lease executed by the lessee.

B. (1) A mortgagor or mortgagee in possession may, for the purpose only of granting a lease authorised by statute or by the mortgage deed of the land or minerals, accept the surrender of an existing lease or agreement for a lease.

(2) Where any consideration is given to the mortgagor for the surrender beyond the acceptance of the new lease the surrender will not be valid without the consent of the incumbrancers.

(3) The surrender shall not be valid unless a new lease is accepted within a month.

(4) After the appointment of a receiver the powers of leasing and accepting surrenders are to vest in the mortgagee appointing such receiver.

This is a summary of the provisions of sections 99 and 100 of the Law of Property Act, 1925.¹ It should be

¹ 15 Halsbury's Statutes 277-281.

noted that these statutory powers of granting leases may be excluded by contrary provisions contained in the mortgage deed or expressed otherwise in writing ; and in practice it happens not infrequently that the mortgagor's statutory powers of granting leases are excluded by the express terms of the mortgage deed.¹

ARTICLE 125.

Implied Incidents where the Mortgage is by Deed.

(1) Where the mortgage is made by deed a mortgagee has the following powers to the like extent as if they had been in terms conferred by the mortgage deed, but not further :

- (i) A power, when the mortgage money has become due, to sell the mortgaged property, or any part thereof, either subject to prior charges or not, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale.
- (ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against fire any insurable property forming part of the mortgaged property, and to add the premiums paid to his mortgage debt.
- (iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or any part of it.

¹ As to the meaning of "best rent reasonably obtainable," see *Coutts & Co. v. Somerville*, [1935] Ch. 438 ; Digest Supp.

- (iv) A power when in possession to cut timber ripe for cutting, and not planted for ornamental purposes, or to contract for such cutting to be completed within twelve months at most from the making of the contract.

(2) These powers are implied only in so far as no contrary intention is expressed in the mortgage deed, and may be varied or extended by such deed.

The foregoing is a summary of the provisions of section 101 of the Law of Property Act, 1925.¹

ARTICLE 126.

Implied Power of Sale.

(1) The power of sale referred to in the preceding Article cannot be exercised by the mortgagee unless :

- (i) Notice requiring payment has been served on the mortgagor, and he has made default in payment for at least three months after such service ; or
- (ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due ; or
- (iii) There has been a breach of some covenant in the mortgage deed or implied by statute on the part of the mortgagor, other than that for the payment of the mortgage debt or interest.

¹ 15 Halsbury's Statutes 283.

(2) The purchase money received by the mortgagee is to be applied to the following purposes and in the following order :

- (i) In discharge of prior incumbrances (if any) to which the sale is not made subject.
- (ii) In payment of the costs of the sale.
- (iii) In discharge of the mortgagee's own debt and any interest due upon it.

The balance he is to hold in trust for the person entitled to the mortgaged property or authorised to give receipts for the proceeds of the sale thereof.

The foregoing is a summary of provisions which are contained in sections 103 and 105 of the Law of Property Act, 1925.¹

It should be noticed that the statutory power of sale conferred on the mortgagee does not *arise* until the mortgage debt has become payable; in other words, until the time (usually six months after the date of the deed) fixed for the repayment of the mortgage money has elapsed without repayment having been made or tendered. And, even when the statutory power of sale has arisen, it cannot be exercised unless and until at least one of the three conditions mentioned in paragraph (2) of the Article has been satisfied. The point may be of importance to a purchaser from the mortgagee. If the power of sale has not arisen—in other words, if the date fixed for repayment has not arrived—the mortgagee has no power of sale at all and he can confer no title on a purchaser. That, however, is a point on which the purchaser, or those who advise him, can be satisfied by a proper perusal of the abstract of the mortgagee's title. On the other hand, if the power of sale has arisen, considerable protection to a *bona fide* purchaser is given by section 104 of the Law

¹ 15 Halsbury's Statutes 286, 288.

of Property Act, 1925,¹ which provides that a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised ; but any person damaged by an unauthorised, or improper, or irregular exercise of the power has his remedy in damages against the person exercising it. Even that, however, will not protect a purchaser who has notice of an irregularity.²

The power is conferred upon the mortgagee for his own benefit. He accordingly in exercising it is under no obligation to consult the interests of the mortgagor. Thus, for example, it is no impeachment of its exercise to show that he sold at a bad season, and that had he held his hand for a time he might have secured a better price.³ Provided he acts *bona fide* and without corruption or collusion with the purchaser, he is not liable for any loss resulting from its exercise.⁴ On the other hand, his position in exercising it is analogous to that of a trustee to the extent that he cannot buy from himself. This principle has been carried very far in the case of *Hodson v. Deans*.⁵ There a building society which was mortgagee of a property sold it by auction under its power of sale. An officer of the society, who had probably fixed the reserved price and instructed the auctioneer, attended the sale and bought it for himself. The sale was at a small undervalue. It was held that it was invalid. He may, however, himself buy with the authorisation of the court, and if he does so at a price insufficient to pay the mortgage debt in full he can sue for the balance.⁶ Moreover, it has been decided that a sale by the mortgagee will not be invalidated by reason only that one of its terms gives to the vendor the right to repurchase the

¹ 15 Halsbury's Statutes 287.

² *Selwyn v. Garfitt* (1887), 38 Ch. D. 273 ; 35 Digest 513, 2429.

³ *Farrar v. Farrar, Limited* (1888), 40 Ch. D. 395 ; 35 Digest 492, 2229. See also *Nutt v. Easton*, [1900] 1 Ch. 29 ; 35 Digest 500, 2314.

⁴ *Kennedy v. De Trafford*, [1897] A. C. 180 ; 35 Digest 504, 2356. See also *Belton v. Bass, Ratcliffe and Gretton, Ltd.*, [1922] 2 Ch. 449 ; 35 Digest 508, 2399.

⁵ [1903] 2 Ch. 647 ; 35 Digest 457, 1976.

⁶ *Gordon Grant & Co. v. Boos*, [1926] A. C. 781 ; 35 Digest 537, 2668.

property, within an agreed period, at a price equivalent to the purchase price.¹

Although the mortgagee has vested in him only a term, or (in the case of a mortgage of leaseholds) a sub-term, a sale by him in exercise of his statutory power is effective, nevertheless, to convey the fee simple or, as the case may be, the term. Thus section 88 of the Law of Property Act, 1925,² provides that, where an estate in fee simple has been mortgaged by the creation of a term of years absolute or by a charge by way of legal mortgage and the mortgagee sells under his statutory power of sale, the conveyance shall operate to vest in the purchaser the fee simple, subject to any legal mortgage having priority to the mortgage in right of which the sale is made, and thereupon the mortgage term or the charge by way of legal mortgage and any subsequent mortgage term or charges shall merge or be extinguished. By section 89³ a parallel provision is made with regard to mortgages of leaseholds. It will be noticed that a sale by a mortgagee does not override prior mortgages though it does extinguish mortgages subsequent to his own. Consequently, although a puisne mortgagee, provided that his mortgage is made by deed, may exercise the power of sale, yet if he sells without the concurrence of the prior mortgagees the purchaser from him will take subject to their prior mortgages.⁴

ARTICLE 127.

Implied Power to Insure.

(1) The power to insure does not arise—

(i) Where there is a condition against insurance by the mortgagee contained in the mortgage deed.

¹ *Belton v. Bass, Ratcliffe and Gretton, Ltd.*, *supra*.

² 15 Halsbury's Statutes 267.

³ 15 Halsbury's Statutes 268.

⁴ *In re Hodson and Howes' Contract* (1887), 35 Ch. D. 668 ; 35 Digest 498, 2286.

- (ii) Where there is a covenant to insure in the mortgage deed and the mortgagor has insured in accordance with it.
- (iii) Where there is no such covenant and the mortgagor has insured to the extent the mortgagee is entitled to insure under the power.

(2) The mortgagee is entitled to insure under the power only to the extent of two-thirds of the value of the insured property.

(3) All money received under the insurance, whether made under the mortgage deed or under the power, is at the option of the mortgagee to be used in restoring the insured property or (subject to any obligation to the contrary) in repaying the mortgage debt.

This power to insure depends on section 101 of the Law of Property Act, 1925.¹

ARTICLE 128.

Implied Power to Appoint a Receiver.

(1) The appointment, position, and duties of a receiver are regulated by the following rules :

- (i) He cannot be appointed until the mortgagee's power of sale referred to in the same section has become exercisable.
- (ii) He, though appointed by the mortgagee, is deemed to be the agent of the mortgagor.

¹ 15 Halsbury's Statutes 283.

- (iii) He is entitled to recover the income of the mortgaged property in the name of either the mortgagor or mortgagee.
- (iv) Any person paying him income is not concerned to inquire whether any case has happened to authorise the receiver to act.
- (v) He must be appointed in writing under the hand of the mortgagee, and he may be removed and a new receiver appointed in the same way.
- (vi) He is entitled to keep out of the income commission at such rate, not exceeding 5 per cent., as is specified in the instrument appointing him, or, if no rate is so specified, then at the rate of 5 per cent., or at a higher rate if allowed by the court.

(2) Income paid to the receiver shall be applied by him to the following purposes :

- (i) In discharge of outgoings of the mortgaged property.
- (ii) In keeping down all annual or other payments, and interest on all principal sums, having priority to the mortgage in right of which he is appointed.
- (iii) In payment of his own commission, premiums of insurance properly payable under the mortgage deed, and costs of necessary or proper repairs directed in writing by the mortgagee.
- (iv) In payment of the interest on the mortgage debt of the mortgagee appointing him or, if so directed by such mortgagee, in paying off the mortgage debt.

The balance he is to hand over to the person who, but for the possession of the receiver, would be entitled to the income of the mortgaged property, or who is otherwise entitled to that property.

This power depends on section 109 of the Law of Property Act, 1925.¹

A later or puisne mortgagee is not entitled to appoint a receiver unless the prior mortgagee does not wish to do so, or unless the puisne mortgagee is prepared to redeem the prior mortgage. Even when a puisne mortgagee has appointed a receiver, if the prior mortgagee demands possession he is entitled to it and to all the rents received by the receiver after notice of the demand.²

¹ 15 Halsbury's Statutes 291.

² *Preston v. Tunbridge Wells Opera House, Limited*, [1903] 2 Ch. 323 ; 35 Digest 401, 1422. There is a useful discussion of the position of a receiver appointed under the mortgagee's statutory power in *White v. Metcalfe*, [1903] 2 Ch. 567 ; 35 Digest 531, 2615.

BOOK I (C) (II) : MORTGAGES AND LIENS (*continued*).

CHAPTER 3.

RIGHT TO REDEEM.

SUMMARY.

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ARTICLE 129.

Extent of the Right to Redeem.

(1) Any person who has any interest in the equity of redemption of the whole or any part of the property included in a mortgage is entitled to redeem the whole of such property.

(2) Any person will be deemed to have an interest in the equity of redemption where he is liable to be and is sued for any part of the mortgage debt or any interest due upon it.

(3) Where there are two or more persons interested in the equity of redemption, the right to redeem will be exercisable by them successively in the order of time in which their different interests arose, or, where the same interest is enjoyed by them in succession, in the order in which it vests in them.

(4) Where the person seeking redemption is a puisne mortgagee, he is entitled to redeem the prior mortgages, if more than one, only in the order in which they precede his mortgage, and only by foreclosing all the mortgages (if any) subsequent to his own.

(5) Any person entitled to redeem mortgaged property may in an action of redemption have judgment for sale instead of redemption. The court may order a sale without deciding the priorities of different mortgagees, and it may give the conduct of the sale to any defendant.

Paragraph (1).

By an interest in the equity of redemption is meant an interest binding on its owner, the mortgagor, whether such interest is or is not binding also on the mortgagee. Thus, in *Tarn v. Turner*,¹ a mortgagor in possession prior to the Conveyancing Act, 1881, agreed in writing to grant a lease. The mortgagee did not join in the agreement. It was therefore not binding against him. It was, however, binding against the mortgagor. It was held that the intended lessee was entitled to redeem. In the words of COTTON, L.J.,² "The interest which he got" (under the agreement) "from the mortgagor makes him to a certain extent an assignee of the equity of redemption, and therefore entitled to all the rights which appertain to the owner for the time being, however small his interest in the equity of redemption may be with regard to duration of time." If, however, the agreement had not been binding on the mortgagor—as, for instance, if it had been an option to purchase not founded on value—the party to it would take no interest in the equity of redemption, and would not be entitled to redeem.³

¹ (1888), 39 Ch. D. 457 ; 35 Digest 343, 857.

² At p. 465.

³ *Pearce v. Morris* (1869), L. R. 5 Ch. 227 ; 35 Digest 344, 867.

The person to be entitled to redeem need not be interested in the equity of redemption of the whole property. If he is interested in the equity of redemption of any part of it he may redeem the whole. Of course, he redeems subject to the equities of all other persons interested.¹ A judgment creditor who has got a receiving order against the mortgagor's property is interested in the equity of redemption and entitled to redeem.²

Paragraph (2).

The most ordinary case of this is that of a mortgagor who, after he has sold his equity of redemption, is sued upon the covenant for the mortgage debt. He is entitled to redeem on payment of the debt and have the mortgaged property reconveyed to him, subject to such equity of redemption as may be subsisting in any other person, as, for instance, his assignee of the equity.³

Paragraphs (3) and (4).

Thus, if Blackacre is mortgaged to A., then to B., and afterwards to C., B. is entitled to redeem before C., and C. before the mortgagor. Again, if Whiteacre is mortgaged by X. to Y., and afterwards X.'s equity of redemption is settled on F. for life and then on G., F. is entitled to redeem before G. Again, in the case of Blackacre (*supra*), if B. refused to redeem, and C. wished to do so, he must redeem B.'s mortgage before he is entitled to redeem A.'s. Not only so, but if B. brought an action to redeem A.'s mortgage he would have to join C. and the mortgagor and claim to foreclose them.⁴ This rule should be read in connection with that as to foreclosure.⁵ Together they constitute the rule that a puisne mortgagee may foreclose without redeeming but cannot redeem without foreclosing.

¹ See *per* COTTON, L.J., in *Tarn v. Turner*, *supra*, at p. 466.

² *In re Parbola, Limited*, [1909] 2 Ch. 437; 35 Digest 565, 2973.

³ *Kinnaird v. Trollope* (1888), 39 Ch. D. 636, at p. 647; 35 Digest 609, 3468.

⁴ *Teewan v. Smith* (1882), 20 Ch. D. 724, at p. 729; 35 Digest 301, 509.

⁵ See Art. 135, *infra*.

Paragraph (5).

This is the effect of section 91 of the Law of Property Act, 1925.¹

The advantage of selling without settling the priorities between the various incumbrances of the same property may be shown by an example. Take the case of Blackacre, *supra*. Say A.'s mortgage's priority is undisputed, but there is a dispute as to whether B. or C.'s mortgage is to rank next to his. If on the sale of Blackacre the proceeds are sufficient only to pay the expenses of sale and the debt due to A., this dispute ceases to be of importance, and the cost of settling it is avoided by selling without deciding that dispute.²

ARTICLE 130.

Conditions of Redemption.

(1) If the right to redeem is exercised on the precise day fixed in the mortgage for the repayment of the mortgage debt, the redemption may be claimed without notice. If, however, such day is past, then the person wishing to redeem must give the mortgagee six months' notice of his intention to redeem, or tender six months' interest over what is due on the mortgage in lieu of such notice, unless (i) the mortgagee himself claims repayment, or (ii) the mortgage is made by deposit of title-deeds.

(2) On redemption the person redeeming must pay the mortgage debt with interest and costs, as determined by the principles stated in the next Article.

¹ 15 Halsbury's Statutes 270.

² See *General Credit, etc. Company v. Glegg* (1883), 22 Ch. D. 549; 35 Digest 353, 961.

Paragraph (1).

If the mortgagor repays the mortgage debt on the day fixed for repayment, he exercises his *legal* right under the mortgage, and is entitled to an immediate reconveyance of the mortgaged property. If he does not do so, his legal right to redeem is gone, and he must appeal to equity to assist him to get the mortgaged property back. Equity will assist him only on terms of his doing equity. One of these terms is that he should give the mortgagee reasonable notice of his intention of repaying the debt in order to afford the mortgagee time to find another investment for his money. If, however, the mortgagee demands repayment, he is entitled to repay at once;¹ and the mortgagee is not entitled, once he has demanded payment, to withdraw the demand and claim notice.² Entering into possession of the mortgaged land is a demand for repayment.³

In the case of a mortgage by deposit, where the accompanying memorandum (if any) does not otherwise provide, the mortgagor may redeem at any time.⁴ This is because such mortgages are made merely for temporary purposes—for instance, with a banker to secure the depositor's overdraft—and are not taken by the mortgagee as an investment.

ARTICLE 131.**Interest and Costs payable on Redemption.**

Upon redemption interest and costs will be given to the mortgagee upon the following principles :

¹ *Smith v. Smith*, [1891] 3 Ch. 550 ; 35 Digest 362, 1044.

² *Samiley v. Wilde*, [1899] 1 Ch. 747, at p. 763 ; 35 Digest 239, 1.

³ *Bovill v. Endle*, [1896] 1 Ch. 648 ; 35 Digest 362, 1045.

⁴ *Fitzgerald's Trustees v. Mellersh*, [1892] 1 Ch. 385 ; 35 Digest 361, 1036.

(1) As to interest—

- (i) Where the rate of interest is fixed by the mortgage agreement, all arrears of interest at that rate.
- (ii) Where no rate of interest is fixed by the mortgage agreement, interest at the rate of 4 per cent. per annum ; and where the rate is fixed only up to the time agreed for repayment of the mortgage debt, interest after such date at the fixed rate, provided it does not exceed 5 per cent. per annum.
- (iii) Even where the mortgagee has taken possession, and his accounts show that he has each year received more net income than was sufficient to pay the interest on the mortgage debt, he will still be allowed interest upon the whole amount of the mortgage debt until the debt is wholly paid off, unless (a) he took possession before any interest on the debt was in arrear, or (b) the mortgage agreement shows that it was intended that he should accept repayment piecemeal.

Where the surplus of income over interest is deducted each year from the amount of the mortgage debt, leaving the balance only bearing interest, the account is said to be taken with *annual rests*.

(2) As to costs—

The general rule is that the mortgagee will be allowed all costs incurred in perfecting, maintaining, and realising his security, and, if

he takes possession, all charges and expenses reasonably incurred in collecting the income and managing the property ; and, if a solicitor, he can charge for personal services, where the work done is such as he would have been entitled to charge against the mortgagor had he retained another solicitor to do it, and where there has been a redemption action, the costs of such action as between party and party. But where the redemption action was necessitated by the mortgagee's misconduct, the court may refuse him the costs of the action and even order him to pay the mortgagor's costs.

Paragraph (1).

(i) When a mortgagor claims redemption the court will grant it only on the terms that he pays all arrears of interest, notwithstanding that section 42 of the Real Property Limitation Act, 1833,¹ makes only six years' arrears of interest recoverable.² The same rule applies where the mortgaged property has been sold and the mortgagor claims the surplus proceeds or in any other case where the mortgagor has to claim the aid of equity to obtain relief. This rule is based, not on the legal rights of the parties, but on the principle just mentioned—that he who seeks equity must do equity. As we shall see, when the mortgagee claims his legal rights the rule does not apply.

It must be remembered that if the rate of interest fixed is to be increased on failure to pay punctually, the increase is held to be in the nature of a penalty, and equity will allow only the rate payable on punctual payment.

(ii) The ground upon which interest is in these cases allowed is not very definitely fixed. Probably the true ground is that he who seeks equity must do equity.³

¹ After June, 1940, Limitation Act, 1939, sect. 18 (5).

² *Dingle v. Coppen*, [1899] 1 Ch. 726 ; 35 Digest 645, 3765 ; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385 ; 32 Digest 424, 1007.

³ *Booth v. Leicester* (1838), 3 My. & Cr. 459 ; 39 Digest 184, 736.

Some judges, however, have put it on implied contract.¹ As to the case where interest is fixed only up to the time for repayment, it may be put on the same ground, or it may be justified as damages for failure to repay the mortgage debt at the proper date under Lord Tenterden's Act, 1833, section 28.

(iii) It is a rule that a mortgagee is not bound to take the repayment of his debt piecemeal. Accordingly when he takes possession his accounts are kept simply by entering receipts to his debit and interest and outgoings to his credit. These are not made up until redemption is claimed. Then debts and credits are each added up, and the surplus of receipts over outgoings and interest is deducted from the amount of the mortgage debt.

If, however, he has agreed to accept payment piecemeal, or has taken possession before there are any arrears of interest, the accounts are not balanced merely upon redemption, but at the end of each year. The surplus of receipts is then deducted from the mortgage debt, and interest henceforth is payable only on what remains of it.

Even if the receipts are not confined merely to the ordinary income of the mortgaged property, but are increased by the sale of part of it, this will not be enough to entitle the mortgagor to a rest as to the ordinary income.²

A clause is sometimes inserted in mortgage deeds permitting the mortgagee to add all arrears of interest to the capital of the mortgage debt so that they shall bear interest. This corresponds to the practice of allowing yearly rests, except that instead of being for the benefit of the mortgagor it is for the benefit of the mortgagee. In taking accounts the court has no power to allow interest on arrears ; it must be allowed by an express provision in the mortgage deed. And where there is such a provision and the mortgagee takes possession, if the profits he receives are equivalent to or greater than the interest

¹ *Re Kerr's Policy* (1869), L. R. 8 Eq. 331 ; 35 Digest 194, 223.

² *Wrigley v. Gill*, [1905] 1 Ch. 241 ; 35 Digest 299, 500 ; *Ainsworth v. Wilding*, [1905] 1 Ch. 435 ; 35 Digest 651, 3846.

accruing on the mortgage, he will not be permitted to treat the interest as in arrear.¹

Paragraph (2).

Costs incurred in negotiating for the loan cannot be added to the mortgage debt;² but the costs of the mortgage deed, where the mortgagor has given a promise to make one if required, the costs of protecting the security, and costs of redemption or foreclosure action can be so added.³

It is the duty of the mortgagee to hand the mortgagor the title-deeds of the mortgaged property together with a reconveyance of it on the mortgagor proffering him the mortgage debt with proper interest and costs; and where the mortgagee refuses wilfully to do so the court will hold him liable for all costs subsequently incurred owing to such refusal.⁴ But the refusal must be wilful. When a vesting order is necessary, if its necessity does not arise from the mortgagee's default the mortgagor must bear the costs.⁵

ARTICLE 132.

Tacking Further Advances.

A mortgagee who, after the date of the mortgage, makes further advances on the security of the same property will be entitled to refuse to be redeemed unless the subsequent

¹ *Wrigley v. Gill*, *supra*.

² *Wales v. Carr*, [1902] 1 Ch. 860; 35 Digest 670, 4064.

³ *Re New Zealand Midland Railway Company*, [1901] 2 Ch. 357; 10 Digest 809, 5166. See also *National Provincial Bank of England v. Games* (1886), 31 Ch. D. 582; 35 Digest 669, 4048. As to expenses of management, see *Powell v. Brodhurst*, [1901] 2 Ch. 160, at p. 167; 35 Digest 606, 3439.

⁴ *Rourke v. Robinson*, [1911] 1 Ch. 480; 35 Digest 365, 1061.

⁵ *Webb v. Crosse*, [1912] 1 Ch. 323; 35 Digest 364, 1060.

advances and the original loan are all repaid together. He may be entitled so to refuse even though, between the dates of the original loan and the dates of the subsequent advances (or any of them), the mortgagor has created intervening incumbrances in favour of other persons; but the mortgagor will be entitled to claim priority for his subsequent advances over intervening incumbrances only in three cases, namely: (1) if an arrangement to that effect has been made with the subsequent mortgagees, or (ii) if he had no notice of the subsequent mortgages at the time when he made the further advances, or (iii) whether or not he had such notice if the mortgage imposes on him an obligation to make further advances.

The law as stated in this Article is all that is left of what is called the equitable doctrine of tacking as applied to mortgages. Before 1936, when freeholds were mortgaged the fee simple was conveyed to the mortgagee. Consequently, there would be only one legal mortgage; and if this was taken by the first mortgagee, the second and all subsequent mortgagees had necessarily to take equitable mortgages only. When the same property was mortgaged several times, the difference between the legal estate and an equitable estate was of considerable importance when questions of priority arose between the different mortgagees. The chief principle applicable was expressed in the maxim: *Where the equities are equal the law will prevail*. This meant that the mortgagee who had the legal estate was entitled to priority over all the others, unless he had been guilty of conduct, such as allowing the title deeds to go back into the possession of the mortgagor, which was deemed to render it inequitable that he should be allowed to rely on the superiority of the legal estate which was vested in him.¹ On the other hand, as between mortgagees who had equitable interests only,

¹ See *ante*, p. 31.

priorities were determined according to the maxim, *Qui prior est tempore potior est jure*; and normally equitable mortgagees would rank for purposes of priority among themselves according to the dates on which they acquired their securities.

By virtue of the doctrine of tacking, however, it was possible for a third or subsequent mortgagee who had merely an equitable mortgage to take a transfer of the legal estate from the first mortgagee and so obtain priority over intervening mortgages.¹ Thus, let us suppose that a tenant in fee simple of land gave a legal mortgage of it to A., a second mortgage to B., and a third mortgage to C. C. might be able, in certain circumstances, to pay off A., take a transfer to himself of the legal mortgage vested in A., and then add or tack his third mortgage to it and thereby acquire priority over B.'s intervening mortgage. This was but another application of the maxim, already quoted, that *where the equities are equal the law will prevail*;² and tacking would be allowed in this way not only when the third mortgagee actually got in the legal estate but also when he acquired the best right to call for the legal estate.³ In all cases, however, it was essential that the equities should be equal; in other words, that the circumstances should not be such as to make it inequitable to allow the third mortgagee to take advantage of the superiority of the legal estate which he had acquired. Consequently, it was held that the third mortgagee could not tack unless, at the time when he advanced his money, he was without notice of the existence of the second mortgage,³ though it was immaterial that he later acquired notice of it before he took the transfer of the legal mortgage.⁴

The doctrine of tacking was based on the superiority which, for reasons of historical accident, our law accorded to the possession of the legal estate. Since 1925, however,

¹ *Marsh v. Lee* (1670), 2 Vent. 337; *Bailey v. Barnes*, [1894] 1 Ch. 25; 35 Digest 461, 2001.

² *Whiteley v. Delaney*, [1914] A. C. 132; 35 Digest 619, 3561.

³ *Brace v. Duchess of Marlborough* (1728), 2 P. Wms. 492; 35 Digest 430, 1701.

⁴ *Taylor v. Russell*, [1892] A. C. 259; 35 Digest 386, 1281.

it is possible for a whole series of mortgages to be legal. Obviously, therefore, it was necessary for those who framed the legislation of 1925 to devise new rules for determining the priority of mortgages. It would have been possible, theoretically, for them to provide that legal mortgages should enjoy priority over equitable ; but, in a system under which several mortgages of the same land might be legal, it would have been impossible to give to one mortgagee priority over all others by reason of his possession of the legal estate only. Moreover, the rule which accorded to the legal estate a superiority over an equitable interest had ceased to serve any useful purpose. Accordingly, the legislation of 1925 introduced entirely new rules for the priority of mortgages.

Those rules are somewhat complicated, and it is impossible here to do more than summarise their effect. At the outset, however, it must be borne in mind that those rules draw no distinction between legal and equitable mortgages. The new distinction is between mortgages which affect a legal estate and mortgages which do not ; and that is a distinction based on the interest which the mortgagor has. If he has a legal estate and he gives an equitable mortgage of it, that mortgage is a mortgage which affects the legal estate.

The priority of mortgages which affect a legal estate depends primarily on registration. Section 10 of the Land Charges Act, 1925, specifies two classes of mortgages which are registrable as charges—namely,

- (a) A puisne mortgage, which is defined as “ any legal mortgage not being a mortgage protected by a deposit of documents relating to the legal estate affected ” ;
- (b) A general equitable charge, which is defined as any equitable charge in the nature of a mortgage “ which is not secured by a deposit of documents relating to the legal estate affected and does not arise or affect an interest arising under a trust for sale or a settlement.”

Thus it comes about that all mortgages, whether legal or equitable, which affect a legal estate but do not carry the title deeds, are registrable ; and it is provided in effect

that such mortgages shall rank for priority among themselves according to the dates of their registration.¹

The position of a mortgage which does carry the title deeds, however, presents some difficulty. Until recently it was generally thought that the very fact that such a mortgage was not made registrable impliedly indicated the intention of the legislature to be that such a mortgage should have priority over all others. It would seem, however, that this view is wrong.² If such a mortgage is made before puisne mortgages are made, then it would seem that normally it will have priority over them, because the very fact that the first mortgage has the title deeds will usually amount to notice, at least constructive, to subsequent mortgagees.³ On the other hand, if a mortgage carrying the title deeds is made at a later date than puisne mortgages, the question whether or not it will have priority over the puisne mortgages will depend on whether or not the puisne mortgages are registered. If they are registered the mortgagee with the title deeds will be deemed to take with notice of them⁴ and, therefore, subject to them. On the other hand, if the puisne mortgages are not registered the mortgagee with the title deeds will have priority over them, because section 13 of the Land Charges Act, 1925, provides that a puisne mortgage or a general equitable charge created or arising after 1925 shall be void as against a purchaser, unless it is registered before the completion of the purchase; and it is provided that the word "purchaser" includes a mortgagee.

With regard to mortgages which do not affect the legal estate, these present little difficulty. Obviously, they can only arise when all that the mortgagor has is an equitable interest and the legal estate is vested in trustees; and mortgagees obtain priority according to the dates on

¹ Land Charges Act, 1925, sect. 13 (15 Halsbury's Statutes 537).

² See a series of articles by R. L. Bignell and C. H. H. Weiss in the Law Journal for 1933, vol. 76.

³ See Law of Property Act, 1925, sect. 199 (15 Halsbury's Statutes 378). The first mortgagee, of course, might lose his priority; e.g. by neglecting to obtain the title deeds or by letting them out of his possession: *Hewitt v. Loosemore* (1851), 9 Hare 449; 35 Digest 478, 2124; *Northern Counties Fire Insurance Co. v. Whipp* (1884), 26 Ch. D. 482; 35 Digest 474, 2088.

⁴ Law of Property Act, 1925, sect. 198 (15 Halsbury's Statutes 377).

which they give written notice to the trustees in whom the legal estate is vested.¹

In a system in which priorities are governed by the foregoing rules it is obvious that tacking, as formerly understood, can have no place. Accordingly, section 94 of the Law of Property Act, 1925,² abolishes tacking although it preserves priorities acquired by tacking before 1926.

The same principle, however, which enabled a third or subsequent mortgagee to tack, also enabled a mortgagee who made several advances on the security of the same property to tack his subsequent advances to his first advance and thus, by gaining for all his advances the protection of the legal estate, to squeeze out intervening incumbrances. Thus, let us suppose that, before 1926, the owner of an estate in fee simple made a first legal mortgage to A., and a second mortgage to B., and then A. made a further advance to the mortgagor on the security of the same property. A. might be able to tack his further advance to his first and so gain for it priority over the second mortgage in favour of B.³ In order that A. might do so, however, it was essential that A., at the time when he made his further advance, should be without notice of B.'s intervening incumbrance.⁴ In ordinary cases, this requirement, that there should be no notice when the further advance was made, was reasonable; but in the case of *Hopkinson v. Rolt*⁵ it was held that notice at the time when the further advance was made would deprive the person making it of his right to tack even though, by the express terms of the original mortgage deed, he was bound to make further advances and it was provided that the further advances, equally with the original loan, should be secured by the property mortgaged. This, in practice, might be very inconvenient; for the

¹ Law of Property Act, 1925, sect. 137 (15 Halsbury's Statutes 314).

² 15 Halsbury's Statutes 273.

³ *Brace v. Duchess of Marlborough* (1728), 2 P. Wms. 491; 35 Digest 430, 1701.

⁴ *Freeman v. Laing*, [1899] 2 Ch. 355; 35 Digest 438, 1785.

⁵ (1861), 9 H. L. C. 514; 35 Digest 437, 1776; as extended by *West v. Williams*, [1899] 1 Ch. 132; 35 Digest 438, 1786.

mortgagee might be liable if he refused to make a further advance and yet lose his priority for it if he did.

At the same time, the practice of making mortgages to secure further advances serves a useful commercial purpose. For instance, an owner of land might desire to erect on it works the construction of which will extend over a substantial period of time though their completion will enhance considerably the value of his property ; and he may desire to do so with borrowed money. It is unlikely that any lender will be prepared to advance to him the money necessary to complete the works on the security of the undeveloped site alone. Consequently, an arrangement is often made whereby the lender advances on the security of the site sufficient funds to enable the works to be commenced and the mortgage provides that he shall make further advances, to be secured on the same property, as and when the work has progressed to such an extent as to provide an adequate security for them. The commercial convenience of such arrangements is so great that those who framed the Law of Property Act, 1925, whilst abolishing tacking in general, sought to retain the advantages of this particular application of it and at the same time to remove the inconvenience of the so-called rule in *Hopkinson v. Rolt*.

Accordingly, section 94 of the Law of Property Act, 1925,¹ provides that a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable)—

- (a) if an arrangement has been made to that effect with the subsequent mortgagees ; or
- (b) if he had no notice of such subsequent mortgages at the time when the further advance was made by him ; or
- (c) whether or not he had such notice where the mortgage imposes an obligation on him to make further advances.

These provisions apply whether or not the prior mortgage was made expressly for securing further advances ; and it is further provided that if a prior mortgage is made

¹ 15 Halsbury's Statutes 273.

expressly for securing a current account or any further advances, then, in relation to any further advances made after 1925, the mortgagee shall not be deemed to have had notice of an intervening incumbrance by reason merely that it was registered, if it was not registered at the date of the original advance or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened.

ARTICLE 133.

Consolidation of Mortgages.

Where two mortgages made by the same mortgagor, but affecting different properties, are or become vested in one mortgagee, such mortgagee will be entitled, as against the mortgagor and his subsequent assigns of his equity of redemption, to consolidate such mortgages into one mortgage for the aggregate of the different mortgage debts upon the aggregate of the different properties. Provided—

- (i) One of such mortgages contains a clause permitting such consolidation ;
- (ii) The times fixed for the repayment of the different mortgage debts have expired ;
- (iii) The mortgagor has not assigned his equity of redemption under one or both of the mortgages before the two mortgages became vested in the same person.

Formerly the right to consolidate mortgages made by the same mortgagor, but affecting different properties, was unlimited, unless the mortgage instruments contained a

clause forbidding consolidation. This rule has been reversed by section 93 of the Law of Property Act, 1925,¹ which enacts that where the mortgages or one of them are or is made after 1881, there is to be no right of consolidation unless a contrary intention appears. In practice, however, it is usual in preparing a mortgage to preserve the right to consolidate by means of a provision in the mortgage deed expressly excluding this section.

(i) The contrary intention need appear only in one of the various mortgages. Thus, in *Re Salmon, Ex parte the Trustee*,² a mortgagor mortgaged Blackacre to A. Afterwards he again mortgaged it to B. Afterwards he again mortgaged it and some other property to C. The mortgage to A. alone contained a clause permitting consolidation. On the bankruptcy of the mortgagor, B. took transfers of A.'s and C.'s mortgages. It was held that the C. mortgage could not be redeemed by the mortgagor's trustee in bankruptcy without his also redeeming the mortgages A. and B.

(ii) and (iii) The rules as to consolidation of mortgages may be summed up thus :

(a) Where an owner mortgages two or more properties to the same person he can redeem either when the mortgage debt secured by it becomes payable without redeeming the other or others. This is a legal right arising under the mortgage contract.³

(b) If the mortgagor does not do so, the mortgagee is entitled to consolidate the two debts and refuse to allow one to be redeemed without the other.⁴

(c) The right to consolidate may be exercised not only against the mortgagor himself but also, in some cases, against an assignee from him. The rule is that the assignee of property which is subject to a mortgage takes the property subject to such equities as exist at the time of the assignment.⁵ If, therefore, before the assignment

¹ 15 Halsbury's Statutes 272.

² [1903] 1 K. B. 147 ; 35 Digest 426, 1647.

³ *Jennings v. Jordan* (1881), 6 A. C. 698 ; 35 Digest 349, 915.

⁴ *Hughes v. Britannia Benefit Society*, [1906] 2 Ch. 60 ; 35 Digest 426, 1655.

⁵ *Harter v. Colman* (1882), 19 Ch. D. 630 ; 35 Digest 427, 1665.

a right to consolidate against the mortgagor exists, it will continue after the assignment to exist against the assignee. Thus, let us suppose that X. mortgages first Blackacre and then Whiteacre to A. A. will have a right to consolidate against X. Consequently, if X. transfers the equity of redemption in either property to Y., Y. will take subject to the existing right to consolidate, and A. will be entitled to insist that Y. shall not redeem the property transferred to him without also redeeming the other. On the other hand, let us assume that X. mortgages Blackacre to A. and Whiteacre to B. and subsequently transfers the equity of redemption in Blackacre to Z. Suppose, further, that later the two mortgages become vested and united in C., who has taken a transfer of them from A. and B. C. will not be entitled to consolidate against Z., because at the time when the transfer was made to Z. no right to consolidate had arisen.¹ The rule that an assignee takes subject only to equities existing at the date of the assignment does not apply, however, if an assignee takes, not one, but two or more properties from the same mortgagor. Thus if A. mortgages Blackacre to X. and Whiteacre to Y. and subsequently transfers the equity of redemption in both properties to B., no right to consolidate exists at the time of the transfer because the two mortgages are vested in different persons. Nevertheless, if the two mortgages subsequently become vested in the same person, that person will be entitled to consolidate against B. The rule is anomalous and contrary to principle, but it has been established for so long that the House of Lords has refused to overrule it.²

(d) A puisne mortgage is, of course, an assignment of the mortgagor's equity of redemption.

(e) There is no consolidation unless the different mortgages were made by the same mortgagor.³

¹ *Minter v. Carr*, [1894] 3 Ch. 498; 35 Digest 427, 1666.

² *Pledge v. White*, [1896] A. C. 187; 35 Digest 423, 1608.

³ *Sharp v. Rickards*, [1909] 1 Ch. 109; 35 Digest 422, 1598.

ARTICLE 134.

Reconveyance on Redemption.

(1) On redemption the mortgagor is entitled in equity to require the mortgagee to reconvey to him the mortgaged property and to return all the title-deeds. Instead of a reconveyance he, or in priority to him any incumbrancer, may require the mortgagee to reconvey to a third person. As between different incumbrancers, the requisition of the one who is prior in time prevails over the requisitions of the others.

(2) Since 1925 every mortgage of a legal estate is made or deemed to be made by a lease or sub-lease containing a clause rendering it void on the payment of the mortgage debt ; and a receipt endorsed on the mortgage instrument is sufficient evidence that the lease or sub-lease is determined and the mortgaged land freed from the incumbrance ; but this does not prevent the mortgagor demanding a reconveyance or assignment of the mortgage if he desires.

BOOK I (C) (II): MORTGAGES AND LIENS (*continued*).

CHAPTER 4.

RIGHT TO FORECLOSE.

SUMMARY.

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ARTICLE 135.

Extent of the Right to Foreclose.

A mortgagee can foreclose the mortgagor's equity of redemption without redeeming mortgages (if any) prior, but not without foreclosing all mortgages subsequent, to his own.

This rule, taken in conjunction with the one stated in Article 129, is commonly summed up in the maxim “redeem up, foreclose down.” Thus, suppose that A. mortgages Blackacre first to B., then to C., then to D., and finally to E. If D. wishes to redeem B.'s mortgage he must also offer to redeem C.'s, though he can if he chooses redeem C.'s without redeeming B.'s. Again, if D. wishes to foreclose A.'s right of redemption, he must also foreclose E.'s right as mortgagee. He can, however, foreclose both A. and E. without redeeming B. or C.

But he cannot redeem B. or C. without claiming to foreclose A. and E. The reason of the rule is that B. and C. are not interested in the foreclosure of A. and E. since their securities in any event take precedence of A.'s and E.'s interest. But A. and E. are interested in the redemption of B. or C. since the value of their security depends upon the state of accounts between B. and C. and the mortgagor, and so it is necessary in an action to redeem B. or C. to have them before the court.¹

It is to be remembered that foreclosure does not merely render the lease or sub-lease held by the mortgagee absolute, but vests in him the fee simple or lease held by the mortgagor.²

ARTICLE 136.

Interest allowed on Foreclosure.

After a decree *nisi* of foreclosure the mortgagor may redeem at any time within six months on payment of the mortgage debt and the same costs as in an action of redemption, and all interest on the mortgage debt which has accrued due during the six years preceding the decree. Where, however, the mortgaged property has been sold and the mortgagor applies for the surplus of the purchase money, the court, in ascertaining what is the surplus, will allow the mortgagee all arrears of interest.

The practice in foreclosure actions is to order an account to be taken as between the mortgagor and the mortgagee seeking foreclosure and all the subsequent mortgagees. The prior mortgagees are not made parties since they are

¹ *Teevan v. Smith* (1882), 20 Ch. D. 734; 35 Digest 301, 509. See also *Stra. Mortgages*, pp. 134, 135.

² *Law of Property Act*, 1925, sects. 88, 89.

not concerned with the rights of parties who take only after they are satisfied. When such accounts are taken they are similar in all ways to those taken in a redemption action, except that the court allows the mortgagee only six years' arrears of interest. This limitation is based on the consideration that the mortgagee is seeking to recover arrears of interest, and is therefore within section 24 of the Real Property Limitation Act, 1833.¹ When the chief clerk has certified the amount of debt, interest, and costs owing by the mortgagor to the mortgagee, he adds six months' further interest to that amount, and an order is made that the mortgagor and the subsequent mortgagees shall redeem within the six months following the order, or be for ever foreclosed of their right to redeem. The defendants then have six months to redeem, but they are bound to pay the whole six months' extra interest, however soon after the order they or any of them may redeem.²

It is customary now where there are several puisne mortgagees to limit one period for all of them to redeem, unless one of them asks for further time. A further time will not be allowed to the mortgagor.³

ARTICLE 137.

Jurisdiction of the Court to Order a Sale.

In any action for foreclosure, redemption or sale, or for raising the mortgage money in any other way, the court may, if it thinks fit, at the request of any one interested in the mortgage money or in the equity of redemption, and notwithstanding the objection of any other such

¹ 10 Halsbury's Statutes 449. After June 1940, Limitation Act, 1939, sect. 18 (5). See *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385; 35 Digest 424, 1007.

² *Hill v. Rowlands*, [1897] 2 Ch. 361; 35 Digest 363, 1053.

³ *Platt v. Mendel* (1884), 27 Ch. D. 246; 35 Digest 578, 3125.

person, order a sale, without allowing time for redemption, on such terms as it thinks fit.

The power of the court to order a sale is given by section 91 of the Law of Property Act, 1925.¹ It is to be distinguished from the right of a plaintiff in a redemption action to require a sale instead of an order for redemption. The latter confers a right to a sale on the plaintiff. This section confers a discretion upon the court to order a sale if it thinks fit.

ARTICLE 138.

When Foreclosure is Complete.

A foreclosure becomes complete—

- (i) In a foreclosure action by an order of the court making absolute a decree *nisi* for foreclosure ;
- (ii) In a redemption action as against the person seeking redemption by an order of the court dismissing the action for any other cause than want of prosecution.

¹ 15 Halsbury's Statutes 270.

BOOK I (C) (II): MORTGAGES AND LIENS (*continued*).

CHAPTER 5.

EQUITABLE LIENS.

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ARTICLE 139.

Nature of an Equitable Lien.

(1) An equitable lien is a right in equity residing in one person to have a claim satisfied out of property belonging to another.

(2) It differs from a mortgage in this, that it does not transfer to the person having it any title at law or in equity to the property, and therefore it cannot be enforced by foreclosure.

(3) It differs from a common law lien in this, that it does not depend for its continuance on the person having it retaining possession of the property, but affects everybody taking the property with notice of it, and is not a mere right of retention until the claim is satisfied, but

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entitles the person having it to obtain satisfaction of his claim by means of a judicial sale of the property.

Paragraph (1).

Most equitable liens arise by operation of equity. We have already had occasion to refer to several of these, for instance, the lien which a trustee has upon the trust estate for costs and expenses properly incurred by him in discharging the trust.

Paragraph (2).

As we have seen, a mortgage transfers the mortgagor's title to the mortgagee, and on the mortgagor's failure to redeem the mortgagee's title becomes absolute in law. Foreclosure is simply the withdrawal of the bar to forfeiture which equity imposes. It in itself never transfers title, and, therefore, where the title has not been otherwise transferred, it can have no application.

Paragraph (3).

It is enough here to point out that at common law a lien is simply the right to retain another person's property until he pays a claim against him, and that such lien is lost the moment the person having it parts with the possession of the property subject to it. Any right to sell to satisfy the lien—which now occurs sometimes—must be given expressly by statute.

In equity, on the other hand, "the owner of an equitable charge or lien on property as a security for money which is due and payable, has a right to a judicial sale of that property to satisfy the charge or lien."¹

¹ *Per* KEKEWICH, J., in *Gorringe v. Irwell India Rubber Works* (1886), 34 Ch. D. 128, at p. 134; 8 Digest 453, 269. See also *per* Lord COTTENHAM, L.C., in *Neate v. Duke of Marlborough* (1838), 3 My. & Cr. 407, at p. 417; 32 Digest 254, 403.

Moreover, like every other equity, it binds every person receiving the property even for value if such person had notice of the lien at the time he received the property.¹

ARTICLE 140.

Vendors' and Purchasers' Liens.

(1) An owner of property who has entered into a binding contract for the sale of it has a lien on such property for the unpaid purchase money from the time at which such sale should have been completed until such purchase money is paid.

(2) A person who has entered into a binding contract for the purchase of property, and in pursuance of such contract has paid before conveyance part or all of the purchase money, has a lien on such property for the purchase money so paid until the property is conveyed to him.

(3) Where such contract is not completed, if the failure to complete is due to the default of the person having the lien, the lien is defeated; if it is due to the default of the other party, it can be enforced by a sale.

(4) When the money secured by the lien is not paid when it should be paid, the court will allow interest upon it at the rate of 4 per cent. per annum.

(5) The above rules apply only when there is nothing in the contract or in the circumstances

¹ *Whitbread and Co. v. Watt*, [1901] 1 Ch. 911; affirmed, [1902] 1 Ch. 835; 32 Digest 271, 519.

surrounding the contract to show that they were not intended to apply.

Paragraph (1).

It is commonly said that a vendor's lien for unpaid purchase money arises upon the conveyance of the property before the whole purchase money is paid. This is not accurate. It arises as soon as the purchase money should be paid, *i.e.*, at the time fixed for completion.¹ If after such time the vendor seeks to enforce the contract, he always asks the court to declare that he has a lien for the purchase money on the land contracted to be sold, and, on this lien being declared, he can ask for a sale and hold the original purchaser responsible for any loss which may occur on such sale.

It is to be noted that the law as to a vendor's and also a purchaser's lien applies equally to realty and personalty.²

Paragraph (2).

This right is simply the counterpart of the vendor's lien. It is customary on entering into a contract for the purchase of property for the purchaser to pay a deposit of about 10 per cent. of the purchase money as an earnest. This deposit creates a lien till the contract is completed by conveyance, or the deposit is repaid or the lien defeated under the next rule.

The usual cause for the enforcement of this lien is the failure of the vendor to make a good title to the property he has contracted to sell. Here, as in every case, save where the contract goes off through the purchaser's default, the purchaser can recover his deposit.³

Paragraph (3).

The rule here stated is but a completion of those stated in the two preceding paragraphs. The vendor and pur-

¹ *Kettlewell v. Watson* (1884), 26 Ch. D. 501; 32 Digest 297, 721.

² *Davies v. Thomas*, [1900] 1 Ch. 435; 32 Digest 284, 614; *In re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67; 32 Digest 282, 598.

³ *Rose v. Watson* (1864), 1 H. L. C. 672; 32 Digest 268, 493.

chaser have their respective liens unless the contract goes off through their respective defaults. If it goes off through the default of either his lien is gone. Thus, in *Ridout v. Fowler*,¹ A. contracted to purchase land from B., and having paid a deposit, was let into possession. When the time for completion arrived A. failed to complete. Subsequently C., to whom A. was indebted, appointed a receiver of A.'s interest in the land. B. commenced an action of ejectment against A., which was settled by A. giving up possession on B.'s paying him a certain sum of money. It was held that A.'s lien on the land had been lost by his default in failing to complete, and that C. had no remedy either against the land or against B.

A contract does not go off through the purchaser's default within this rule when it is rescinded by the vendor under an express power which could not be exercised if the purchaser had faithfully carried out his obligations. Thus, in *Whitbread and Company v. Watt*,² A. entered into a contract to purchase land from B., and paid a deposit of £200. By the terms of the contract A. was to erect three hundred houses within two years, and on the erection of such houses B. was to convey the land to A., and if A. failed so to erect these houses, B. could rescind the contract. A. did fail to erect them and B.'s assign rescinded. It was held that A. had a lien on the land for the £200 deposit.

Paragraph (5).

Sometimes the purchaser's lien for his deposit is expressly excluded by the contract, and very often his right to interest is excluded in the same way, unless the contract goes off through the vendor's wilful default.

The vendor's lien is more often excluded by the circumstances of the contract showing that no such lien was intended. Thus, if he accepts a valuable security for the purchase money, or if the consideration is not the payment of a lump sum but is an annuity not charged on the land, the court will hold that no lien was intended.³

¹ [1904] 2 Ch. 93; 32 Digest 272, 523.

² [1902] 1 Ch. 835; 32 Digest 271, 519.

³ *Dixon v. Gayfere* (1857), 1 De G. & J. 655; 32 Digest 282, 594.

ARTICLE 141.

Subrogation.

Where a debtor has a right to indemnity against a third person, equity will permit the creditor to stand in the shoes of the debtor and take advantage of all remedies he is entitled to against such third person. This is what is called the doctrine of *subrogation*.

The most common example of subrogation occurs in the case of an executor carrying on the business of his testator. When this happens the executor is liable personally to the trade creditors for the debts he contracts in carrying on the business. If, however, he is acting in carrying it on in accordance with the testator's will, he is entitled to an indemnity against these trade debts from the estate of the testator. And where the business is carried on with the consent of the testator's creditors, this indemnity takes precedence of the claims of such creditors¹; but merely standing by does not amount to a consent of creditors to carrying on the business.² The trade creditors may proceed personally against the executor, but they may also claim the advantage of his indemnity and proceed directly against the testator's estate.³ If they proceed against the estate they can recover only what he was entitled to recover. Thus, where a receiver of a company had incurred trade debts to the extent of £900 and had received on behalf of the company £400 which he had not accounted for, it was held that the trade creditors could subrogate only to the extent of £500.⁴

¹ *Dowse v. Gorton*, [1891] A. C. 190; 24 Digest 609, 6405.

² *In re Oxley*, [1914] 1 Ch. 604; 24 Digest 610, 6409.

³ *Re Frith, Newton v. Rolfe*, [1902] 1 Ch. 342; 24 Digest 564, 6025.

⁴ *In re British Power Traction and Lighting Company, Limited*, [1910] 2 Ch. 470; 10 Digest 802, 5083.

ARTICLE 142.

Assignment of After-acquired Property.

A contract for valuable consideration to transfer property which at the time of contracting does not belong to the person agreeing to transfer it, will, on such person becoming entitled to such property, be enforced in equity as if the contract were a declaration of trust.

“ A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment.”¹

At the same time, where the assignment is of a prospective share in definite property the assignment creates from its commencement more than a personal contract between the assignor and the assignee : it gives the assignee a right *in rem* which will in equity vest the property in the share in him the moment the share vests in law in the assignor.²

¹ Per JESSEL, M.R., in *Collyer v. Isaacs* (1881), 19 Ch. D. 342, at p. 351 ; 20 Digest 254, 173.

² *In re Lind*, [1915] 2 Ch. 345 ; 8 Digest 434, 113.

BOOK I (C).

Section III. Married Women's and
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ARTICLE 143.

Trusts for the Benefit of Women.

(1) Legal interests could not (until the common law was altered by Act of Parliament) be held by a married woman separately from her husband ; nor could they be rendered inalienable by her husband and her during the continuance of the marriage, or during *coverture* as it is called. Equitable interests could be so held by a married woman separately from her husband if the instrument conferring them on her so directed, and even to-day there are married women restrained from alienating their separate property by virtue of directions to that effect in the instruments conferring such property on them.

(2) A trust for the benefit of a woman, whether married or unmarried, is now governed

in general by the ordinary law applicable to private trusts subject to the following qualification :

(3) A condition in the trust instrument restraining her from alienating the trust property or anticipating the income of it so long as she is married is good, provided that the condition was imposed by an instrument executed before the 1st January, 1936.

Paragraphs (1) and (2).

At common law a married woman was under a complete incapacity during coverture of holding any kind of property separately from her husband. In equity, on the other hand, she was subject to no such incapacity. In fact, equity mitigated in two directions the harshness of the common law rules dealing with the proprietary capacity of married women.

In the first place, the courts of equity established the doctrine which is called the *wife's equity to a settlement*. According to this doctrine, where an interest in possession in property accrued to a husband in right of his wife and, in order to obtain such property, the husband had to make a claim coming within the exclusive or concurrent jurisdiction of equity, the court, applying the maxim that *he who seeks equity must do equity*, would make it a condition of assisting the husband to obtain the property that he should make a settlement of the property, or of such part of it as the court thought fit, for the benefit of the wife and her children. At first this principle was applied only in cases where the husband was plaintiff in proceedings in equity, but ultimately the wife herself was permitted to come before the court and assert her equity to a settlement.¹

In the second place equity developed the doctrine of the wife's equitable separate estate. The foundation of the

¹ *Elbank v. Montolieu* (1799), 5 Ves. 737 ; 23 Digest 440, 5099.

whole system was what was called the *separate use*. If property were given by any one—including the husband—to a married woman and the donor indicated clearly that it should be enjoyed by her independent of her husband, or if before marriage husband and wife agreed that after marriage her own property should be so enjoyed, equity insisted that the direction or agreement should be observed. If trustees were appointed, it was their duty to see that the married woman herself received the property and its profits, and if no trustees were appointed then, though the property vested in law in her husband, equity constituted him a trustee of it for the same purpose. Having once established thus the capacity of a married woman to hold property in equity, equity proceeded slowly to apply the maxim “equity follows the law.” It held that she could sell it, leave it by her will, or contract so as to bind it. A married woman, however, was presumed both in equity and law to contract as her husband’s agent, and her debts accordingly could be satisfied out of her separate estate only when she contracted in respect to it.¹ And the separate use was established to protect the wife during the coverture against her husband. Accordingly, when she died during coverture, in so far as she had not disposed of her property during her life or by her will, her husband’s common law rights revived. That is, he was entitled to her personalty as her administrator and, if he had issue by her capable of inheriting, to an estate for his life by the curtesy in her heritable freeholds.

This was the state of the law as to trusts for married women’s benefit when the Married Women’s Property Act, 1882, was passed. The short effect of that statute was to declare to be statutory separate estate all the unsettled property of a woman married after December 31st, 1882, and all the unsettled property the title to which accrued after that date to a woman married before it.² The same incidents were attached by the Act to such statutory

¹ *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454; 27 Digest 120, 968.

² See *In re Bacon, Toovey v. Bacon*, [1907] 1 Ch. 475; 27 Digest 85, 667.

separate estate as equity had attached to the equitable separate estate.

Nevertheless, the Act did not abolish the equitable separate estate of married women ; and in most cases the property of married women still continued to be held by trustees for them. This was in order to secure for married women the protection of a restraint on anticipation, though, where the property was realty, a trust ceased to be strictly necessary.¹ It was not, in fact, until August 2nd, 1935, that the equitable separate estate of married women was finally abolished. On that date there came into operation the Law Reform (Married Women and Tortfeasors) Act, 1935.² Section 1 of that Act provides that a married woman shall be capable of acquiring, holding and disposing of any property, in all respects as if she were a *feme sole* ; and section 2 provides that all property which, immediately before the passing of the Act, was the separate property of a married woman or held for her separate use in equity shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly.

At the same time the Act has not rendered useless the learning which has grown around the earlier equitable doctrines. It is expressly provided that nothing in the provisions already cited shall, during coverture which began before January 1st, 1883, affect any property to which the title (whether vested or contingent and whether in possession, reversion or remainder) of a married woman accrued before that date, except property held for her separate use in equity. Even the doctrine of the wife's equity to a settlement might be applicable, therefore, at the present time ; namely, in the case of a married woman who became entitled before 1883 to property which was not her separate property in equity. Most of such property, obviously, must ere now have been disposed of. It is not inconceivable, however, that a reversionary interest to which a married woman became entitled before

¹ *Re Lumley, Ex parte Hood-Barrs*, [1896] 2 Ch. 690 ; 27 Digest 102, 804.

² 28 Halsbury's Statutes 104.

1883 might fall into possession at present ; and if it did the doctrine of the equity to a settlement would be applicable to it. More important in modern times, however, is the doctrine of the restraint on anticipation. The Act of 1882 expressly preserved that doctrine ; and, although the Act of 1935 provided that, subject to certain exceptions, a restraint on anticipation could not be imposed on the property of a married woman after 1935, it expressly preserved restraints imposed before 1936. It is necessary, therefore, to consider restraints on anticipation.

Paragraph (3).

Both at law and in equity a condition restraining a man from alienating his property is void. The only way in which this object can be indirectly secured is by a condition determining his interest in the property on his attempting to alienate it. And such a condition is void if attached to an absolute interest or if introduced by a settlor in settling his own property on himself.

But both in equity and later at law a condition restraining a woman from alienating her property during coverture was good. And it might be attached to the income merely or to the absolute interest, and might be introduced where the settlor was settling her own property on herself.

The *clause against anticipation*, as this condition is usually called, was invented by Lord THURLOW, C., for the purpose of protecting the wife's property, in the words of Lord BROUGHAM, from the kicks or kisses of her husband.

As the restraint is for the purpose of protecting the wife's property from the husband it only operates while she has a husband. The moment he dies or ceases to be her husband her absolute right to do what she will with her property revives.¹ If, however, the restraint is general it will revive again on a second marriage unless the woman while not under coverture alienates the property, or takes it from the trustees or serves the

¹ *Tullett v. Armstrong* (1838), 1 Beav. 1 ; 27 Digest 101, 793.

trustees with notice that she repudiates the restraint.¹ In the same way, it ceases, as far as income is concerned, the moment the income becomes payable to her, even though it has not then reached her hands. From that moment she becomes absolute owner of the income accrued due.²

The Law Reform (Married Women and Tortfeasors) Act, 1935,³ expressly provides that it shall not interfere with or render inoperative any restraint on alienation imposed by any instrument executed before January 1st, 1936. On the other hand, it enacts that any instrument executed on or after January 1st, 1936, shall, in so far as it purports to attach to the enjoyment of any property by a woman any restriction upon anticipation or alienation which could not have been attached to the enjoyment of that property by a man, be void. In construing these provisions it is important to notice that they do not mean that no restraint on anticipation can come into existence after 1935. The material question is, not when the restraint comes into existence, but when the instrument creating it was executed. Thus let us suppose that by an instrument executed before 1936 property is settled upon trust (*inter alia*) to pay the income to A. during her life and the instrument provides that in the event of A. marrying she shall be restrained from anticipating the income. A. may not marry for many years after 1935. Nevertheless, if and when she does marry, the restraint will arise and will be valid, because the instrument creating it was executed before 1936. On the other hand, even an immediate restraint purported to be created by an instrument executed after 1935 will be void.

To this rule, however, there is an important exception ; namely, an instrument executed on or after January 1st, 1936, and imposing a restraint on anticipation in pursuance of an obligation to do so created before that date is to be deemed to have been executed before 1936. On the other hand, it is provided that a proviso in an instrument made in exercise of a special power of appointment shall

¹ *In re Chrimes*, [1917] 1 Ch. 30 ; 27 Digest 124, 1002.

² *Hood-Barrs v. Heriot*, [1896] A. C. 174 ; 27 Digest 106, 833.

³ 28 Halsbury's Statutes 106.

be deemed to be contained in that instrument only and not in the instrument by which the power was created. There is also a special provision with regard to wills; namely, that the will of any testator who dies after 1945 shall (notwithstanding the actual date of the execution thereof) be deemed to have been executed after January 1st, 1936.

ARTICLE 144.

The Restraint on Anticipation.

Where a married woman's property is subject to a restraint upon anticipation, the following rules apply :

(1) Where a judgment is obtained against her during coverture, the corpus and the future income cannot be taken to satisfy the judgment debt, unless the settlement imposing the restraint was of her own property and the debt for which judgment is recovered was contracted by her before marriage.

(2) Where she is made bankrupt her separate estate vests in her trustee in bankruptcy, but during coverture the income remains payable to her unless the court in its discretion otherwise directs.

(3) During coverture the court may by its order deal with the property subject to restraint as if it were not subject at its discretion for the following purpose—

- (i) For her own benefit, and with her consent, where it is shown to be for her benefit that it should be removed.

- (ii) For the purpose of indemnifying her trustee in respect of liability for a breach of trust where the trustee committed such breach at her instigation or request or with her consent in writing.
- (iii) For the purpose of paying the costs of an action or proceeding instituted by her or her next friend on her behalf.
- (iv) For the purpose of paying her creditors when she has been made bankrupt.

The restraint on anticipation was invented to protect the married woman's separate property against her husband. To accomplish this purpose it was necessary to protect it against herself, her creditors also, and indeed all others having claims against her.¹ This absolute immunity was formerly given by the Court of Chancery, but, as the above Article shows, it has now to some extent been modified by statute.

A married woman might always refuse to accept property given or left to her subject to a restraint.²

Paragraph (1).

In the first place it should be remembered that as far as income is concerned, that is protected by the restraint only so long as it is subject to it. This subjection ends the moment an instalment of income becomes immediately payable to the married woman. It is then her separate property, with which she may deal as she likes. Accordingly, like other unprotected separate property, it is liable for judgments recovered against her while it remains her separate property—that is, while her trustees hold it for her or while it remains in her

¹ *Lady Bateman v. Faber*, [1898] 1 Ch. 144; 27 Digest 114, 918.

² *In re Wimperis*, [1914] 1 Ch. 502; 27 Digest 107, 834.

hands unspent.¹ But it is not liable for judgments recovered against her before it accrued due to her, *i.e.*, a judgment creditor cannot claim satisfaction of his debt out of the future income of the protected estate.²

As regards the corpus of the separate estate subject to restraint the married woman cannot incur during coverture any legal obligation with regard to that, subject to the exceptions contained in the second and third paragraphs of the above Article. Accordingly, if by the death of her husband during coverture such restraint ceases, it cannot then be taken in execution of a judgment founded on any contract or tort of the married woman during coverture.³

It has been pointed out that a single woman who incurs debts is not permitted to defraud her creditors by means of a settlement on a subsequent marriage. Her liability continues after her marriage as before, notwithstanding any clause against anticipation contained in her settlement, as far as the property contained in that settlement is her own. If it is property settled upon her on or after the marriage by some one else—as, for example, her husband—the restraint is perfectly effectual as regards ante-nuptial as well as post-nuptial debts.⁴

Paragraph (2).

Originally a married woman could not be made bankrupt. This was an inevitable corollary of the common law doctrine that she could not enjoy property or incur a legal obligation apart from her husband. When equity conferred the right to hold property and incur legal obligations on her own behalf, her immunity from the law of bankruptcy continued. By section 1 (5) of the Married Women's Property Act, 1882,⁵ she might be made bankrupt, but only under one state of circumstances—when

¹ *Hood-Barrs v. Heriot*, [1896] A. C. 174 ; 27 Digest 106, 833.

² *Whiteley v. Edwards*, [1896] 2 Q. B. 48 ; 27 Digest 123, 995 ; *Bolito and Co. v. Gidley*, [1905] A. C. 98 ; 27 Digest 123, 997.

³ *Brown v. Dimbleby*, [1904] 1 K. B. 28 ; 27 Digest 121, 974.

⁴ *Birmingham Excelsior Money Society v. Lane*, [1904] 1 K. B. 35 ; 27 Digest 120, 965.

⁵ 9 Halsbury's Statutes 374.

she was carrying on a trade separately from her husband. By section 125 of the Bankruptcy Act, 1914,¹ she might be made bankrupt if she traded at all. And now, by section 1 of the Law Reform (Married Women and Tortfeasors) Act, 1935,² she may be made bankrupt, whether she trades or not, just as though she were a single woman.

The effect of her becoming bankrupt is that her separate estate, whether free or subject to a restraint on anticipation, vests in her trustee in bankruptcy. The free separate estate vests absolutely. The protected separate estate in the absence of an order of the court to the contrary vests subject to the restraint, that is, as long as her husband lives she continues, in spite of the bankruptcy, entitled to the income of it for her own use. On her husband's or her own death, the trustee holds it free from the restraint.³ But now by section 52 of the Bankruptcy Act the court has power to direct that the whole separate property may be applied to the payment of the creditors as if no restraint applied to it.

Paragraph (3).

(i) Section 169 of the Law of Property Act, 1925, gives the court power with her consent to bind, by judgment or order, a married woman's interest in property which is subject to a restraint upon anticipation or which by law she is unable to dispose of or bind, including a reversionary interest arising under her marriage settlement. The benefit which will justify the court in lifting the restraint must be a personal benefit to the wife, though not necessarily a pecuniary one.⁴ What is such a benefit is, in each case, a question of fact; but the section does not give to the court a general power to remove the restraint. It merely gives to the court a power to make binding a particular disposition of the married woman's property,

¹ 1 Halsbury's Statutes 688.

² 28 Halsbury's Statutes 104.

³ *Re Wheeler's Settlement Trusts*, [1899] 2 Ch. 717; 27 Digest 389, 3838.

⁴ *Paget v. Paget*, [1898] 1 Ch. 47; 27 Digest 153, 1236.

or part of it, in a case where the married woman herself consents and the transaction is beneficial to her.¹

(ii) This is the effect of section 62 of the Trustee Act, 1925.²

(iii) This is the effect of section 2 of the Married Women's Property Act, 1893.³ Where the married woman is the defendant in an action, an appeal or other step in such action is not,⁴ while a counterclaim is,⁵ a proceeding instituted by her within this rule.⁶

Where the married woman does institute the proceeding, the onus of showing that the costs should not be paid out of her separate estate lies on her.⁷

(iv) This is the effect of section 52 of the Bankruptcy Act, 1914.

ARTICLE 145.

Infants' Property.

(1) The father is the natural guardian of his infant legitimate children, and where no trustees are appointed to their property he is entitled to receive the income of it during the infants' minority. He is also entitled to appoint by deed or will guardians to act after his death. Such guardians are called *testamentary* guardians. Now, however, by statute the mother enjoys rights which are substantially equal to those of the father. The mother of illegitimate infant children is their *natural* guardian, and the mother of legitimate infant children is now, if she survives the father, a *statutory* guardian jointly with the testamentary guardian (if any).

¹ *Re Pollard's Settlement*, [1896] 1 Ch. 901; 27 Digest 126, 1023; *Re Blundell*, [1901] 2 Ch. 221; 27 Digest 127, 1039.

² 20 Halsbury's Statutes 153.

³ 9 Halsbury's Statutes 385.

⁴ *Hood-Barrs v. Heriot*, [1897] A. C. 177; 27 Digest 106, 833.

⁵ *Hood-Barrs v. Cathcart*, [1895] 1 Q. B. 873; 27 Digest 132, 1076.

⁶ See also *Huntley v. Gaskell*, [1905] 2 Ch. 656; 27 Digest 131, 1067.

⁷ *Pawley v. Pawley*, [1905] 1 Ch. 593; 27 Digest 129, 1053.

(2) As representing the King, who is *parens patriæ*, the Chancery Division has jurisdiction over infants and their property, and can make orders for the removal of natural, testamentary or statutory guardians, for the maintenance and upbringing of infants and for the confirmation of contracts by and sales of the property of infants where it is for the benefit of the infants that such orders should be made ; and where infants are entitled to property it can itself assume a guardianship over them by making them wards of court.

Paragraph (1).

Where there are no trustees of an infant's property the father or guardian takes no estate in it ; but he is entitled to receive on the infant's behalf the rents and profits of it. If it is desirable to sell the infant's property, a provisional contract must be submitted for the approval of the court. The order permitting the sale usually provides that the nature of the property is not to be changed in case the infant dies before attaining twenty-one. In the absence, however, of such a provision the property becomes converted from the time the order is made.¹

The original principle of equity was that the father was "by nature and by nurture" the guardian of his legitimate children, and, consequently, he had the sole right of controlling their property and of directing their education and upbringing. The principle was carried so far that at one time an agreement, contained in a separation deed and providing that the father should hand over to the mother the custody of the infant children of the marriage, was held to be void as being contrary to public policy. The Custody of Infants Act, 1873,² however, provided that no such agreement should be invalid by reason only that it provided that the father should relinquish to the

¹ *In re Searle, Ryder v. Bond*, [1912] 2 Ch. 365 ; 20 Digest 363, 1008.

² 9 Halsbury's Statutes 783.

mother the custody and control of any of the infant children of the marriage. In spite of this enactment, it has been held that such an agreement will not be upheld if the court is of opinion that custody of the child by the mother will not be for the child's benefit.¹

Formerly, the father as guardian had the right to custody of the persons and to control of the education, religious and secular, of his infant children; and it was held that, except in cases covered by the Custody of Infants Act, 1873, he could not effectually bind himself to relinquish those rights to any other person. It was laid down with regard to religious education, that the rule was so strong that, except in very special circumstances, a child must be brought up in the religious belief of the father even after the death of the father.² But the original rule has been modified by the Guardianship of Infants Act, 1925,³ section 1 of which provides that where in any proceeding before any court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application thereof is in question, the court shall have regard to the welfare of the child as the first and paramount consideration and shall not take into consideration whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, is superior to that of the mother, or the claim of the mother superior to that of the father.

Not only had the father the guardianship during his own life; he also had the right to appoint a guardian to act after his death. The father still has this power; for section 5 of the Guardianship of Infants Act, 1925,⁴ provides that the father of an infant may by deed or will appoint any person to be guardian of the infant after his death. But the section gives equal rights to the mother and provides that she also may, by deed or will, appoint any person to act as guardian after her death. Any guardian so appointed by the father or the mother acts jointly with

¹ *In re Besant* (1879), 11 Ch. D. 508; 28 Digest 341, 2088.

² *In re Agar-Ellis* (1878), 10 Ch. D. 49; 28 Digest 275, 1258.

³ 9 Halsbury's Statutes 820.

⁴ 9 Halsbury's Statutes 822.

the surviving parent, unless the surviving parent objects to his so acting. Where guardians are appointed by both parents, then after the death of the surviving parent they act jointly.

Formerly, if the father appointed a guardian the rights of the guardian so appointed would displace those of the mother. Now, however, by section 4 of the Guardianship of Infants Act, 1925,¹ it is provided that, on the death of the father, the mother, if she survives, shall be the guardian, either alone or jointly with any guardian appointed by the father. If no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the court may, if it thinks fit, appoint a guardian to act jointly with the mother. Conversely, on the death of the mother, the father, if surviving, is to be the guardian, either alone or jointly with any guardian appointed by the mother; and the court has a similar power to appoint, if it thinks fit, a guardian to act jointly with the father.

By section 5,² if a surviving parent objects to acting jointly with a guardian appointed by the deceased parent, or if a guardian so appointed considers that the surviving parent is unfit to have the custody of the infant, the guardian may apply to the court, and the court may then (1) refuse to allow the guardian to act, or (2) allow him to act with the surviving parent, or (3) allow him to act as sole guardian; and, in the last case, the court may order the surviving parent to pay a periodic sum towards the infant's maintenance.

Paragraph (2).

The court has full jurisdiction over infants whether the father is living or not; and, in the exercise of that jurisdiction, it has always had a discretionary power to control the father's rights in any case where he was exercising them in a manner inconsistent with the child's welfare. It has been laid down that the court will not remove the father from the guardianship, however, unless a strong case for such removal is made; and it has been said that

¹ 9 Halsbury's Statutes 821.

² 9 Halsbury's Statutes 822.

the father's rights will only be interfered with where he professes immoral or irreligious opinions which are deemed to unfit him to have the custody of any child at all or where he has abdicated his rights by a course of conduct which would make the resumption of parental authority by him capricious and cruel to the child.¹ Whether the Guardianship of Infants Act, 1925,² has altered the law in this respect is uncertain. It is possible, though by no means certain, that, in view of the provision, already quoted, that the welfare of the child is the paramount consideration, the court might be prepared to remove the father from the guardianship on grounds less strong than those formerly required to be shown. On the other hand, it might still be suggested that paternal authority is of paramount importance to the child.³

This jurisdiction has come to the Chancery Division from the former Court of Wards. The Court of Probate also has power to make orders as to the custody of infants during their minority.⁴ Similarly, section 6 of the Guardianship of Infants Act, 1925,⁵ provides that where two or more persons act as joint guardians of an infant and they are unable to agree on any question affecting the welfare of the infant, any of them may apply to the court for its direction, and the court may make such order regarding the matters in difference as it may think proper.

Any person is entitled to apply to the court as next friend to the infant. Such person is responsible for the costs of the proceedings, but is entitled to an indemnity out of the infant's property in case the proceedings were clearly initiated and carried on for the infant's benefit.⁶ Any such proceedings have the effect of making the infant a ward of court. Once an infant has been made a ward of court all dealings with his property and person are subject

¹ *In re Besant* (1879), 11 Ch. D. 508; 28 Digest 341, 2088; *In re Agar-Ellis* (1878), 10 Ch. D. 49; 28 Digest 275, 1258.

² 9 Halsbury's Statutes 820.

³ See *In re Carroll* (No. 2), [1931] 1 K. B. 317; Digest Supp. This case supports the latter view, but it is not conclusive. It should also be noted that GREER, L.J., dissented.

⁴ *Thomasset v. Thomasset*, [1894] P. 295; 28 Digest 142, 26.

⁵ 9 Halsbury's Statutes 823.

⁶ *Steeden v. Walden*, [1910] 2 Ch. 393; 28 Digest 315, 1785.

to the sanction of the court, though in general the court will enforce the wishes of the infant's natural or testamentary guardian where such wishes are reasonable. Any unauthorised dealings with the infant—such as marriage—amount to contempt of court, even where the person having the dealings was not aware that the infant was a ward of court. In consequence of this it has become customary for a parent or guardian, who wishes to prevent an undesirable marriage, to pay some money into court in trust for the infant and commence an action for the administration of the trust.¹

ARTICLE 146.

Infants' Settlements.

An infant on coming of age can then or within any reasonable time afterwards affirm or repudiate any disposition of his property, or any contract made by him during his infancy, subject to the following limitations :

- (1) A settlement of his or her property by an infant not less than twenty being a male, or not less than seventeen being a female, made on his or her marriage and approved by the court, is as valid as if the settlor had been of full age when the settlement was made.
- (2) A settlement not within the above rule made on marriage by the man of his intended wife's property, if she is an infant, may on her attaining full age be

¹ See *In re H.'s Settlement*, *H. v. H.*, [1909] 2 Ch. 260 ; 28 Digest 343, 2127. See also *In re Liddell's Settlement Trusts*, [1936] 1 Ch. 365 ; [1936] 1 All E. R. 239 ; Digest Supp.

repudiated by her, but if she dies before attaining full age it will bind or pass any property of hers to which he may become entitled on her death and which he could otherwise have bound or disposed of.

- (3) An infant who repudiates a settlement on attaining full age is liable to have any interest taken by him or her under it appropriated to make compensation for any benefits lost by the other parties to the settlement through such repudiation.

This is a short summary of the Infants Settlement Act, 1855.¹

¹ 9 Halsbury's Statutes 780.

BOOK II.
EQUITABLE REMEDIES.

INTRODUCTION.

CHARACTERISTICS OF
EQUITABLE REMEDIES.

SUMMARY.

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INTRODUCTION TO BOOK II.

CHARACTERISTICS OF
EQUITABLE REMEDIES.

ARTICLE 147.

Equity acts on the Conscience.

The Court of Chancery, being not a court of law but a court of conscience, had for its object the guardianship not of the rights but of the consciences of the parties coming before it. Hence its remedies were directed not to secure through the action of its officers compensation to a plaintiff whose rights had been invaded, but to ensure that both the plaintiff and the defendant should themselves act in such a manner as would leave their consciences void of offence.

As we have seen, equity originated from the King's conscience. It also operated on his subject's conscience. The notion was that the King as a conscientious man sat by his representative the Chancellor in the Court of Chancery to make litigants there act as men of conscience should act.

This could only be done by insisting that all parties to proceedings in equity should be compelled personally not to do what was evil and to do what was good ; for to allow them to do wrong and then to seize their chattels to make compensation to the person wronged could not relieve them from the sin of wrongdoing. Nor was it less a sin

for a plaintiff to demand justice against a wrongdoer when he himself was doing wrong. These principles, combined with the fact that whether an equitable remedy was granted or not or whether it was granted absolutely or subject to equitable conditions depended on the discretion of the Chancellor,¹ enabled him to base equitable remedies on the rules and shape them in the forms now to be discussed.

ARTICLE 148.

Equity acts in personam.

Originally equity directed its decree to the person who had done or was contemplating doing a wrong, and ordered him personally to keep his conscience clear by carrying out the decree. If he failed to obey, it had him arrested for contempt of court and imprisoned until he purged his contempt by obeying the order. Though now equitable remedies can usually be enforced as if they were legal remedies, this characteristic is still the chief distinction between the enforcement of the judgments of equity and the enforcement of the judgments of the law.

This rule is summed up in the maxim that equity acts *in personam*.

Formerly Chancery decisions were not technically termed judgments, but orders or decrees. That was because they were directed to the defendant who was himself required to carry them out. If he failed to do so, the court ordered that he should be arrested and im-

¹ See Art. 2.

prisoned until he did as directed. This was commonly summed up by saying that Chancery decisions were enforced by *process of attachment*. Courts of law, on the other hand, delivered judgments and enforced their judgments by their own officers. This was usually called enforcement by *process of execution*. Thus, if equity decided that a defendant had obtained the legal ownership of land from the plaintiff by a fraud, it ordered the defendant to execute a reconveyance to the plaintiff; and if he refused to obey, the court attached him and sent him to jail till he did so. If the law, however, decided that land held by the defendant was legally the property of the plaintiff, and the defendant nevertheless refused to surrender it to the plaintiff, the court directed the sheriff to execute the judgment by turning out the defendant, if necessary by force, and putting the plaintiff in possession.

At first the writ of attachment was the only mode by which Chancery could enforce its judgments; but in time the obstinacy of particular defendants led the court to seek other modes. Firstly, a fine was added to imprisonment; then a writ of assistance which directed the sheriff to put the plaintiff in occupation of property to which he was equitably entitled; then a writ to sequester first the property in dispute, then one to sequester all the property of the defendant till he made submission; and lastly, one to pay equitable debts out of the profits of the sequestered property.

Lastly, equity still acts *in personam*. By virtue of various statutes not only may its judgment now be enforced by other means than process of contempt, but in certain cases it can by its order transfer the legal ownership of the property concerned in an action. Nevertheless, the ordinary mode of enforcing a judgment which formerly could be given only in the Court of Chancery, *i.e.*, orders especially requiring a party to an action to do any act other than the payment of money, or to abstain from doing anything, is still by attachment and committal.

The doctrine that equity acted *in personam* had the effect of enlarging the jurisdiction of the chancery courts over that of courts of law. Since the latter enforced

their judgments by process of execution, where the dispute was as to the ownership of land and the land was not situate in England, the law courts refused to hear it; since, if they gave judgment for the claimant, their officers could not execute it. As equity acted against the persons of the defendants, then if the defendants or any of them were in England equity could enforce its decision in a dispute as to land, no matter whether the land was situate in England or not; and accordingly it heard such disputes. But it hears such disputes only (i) when the remedy sought is an equitable remedy and (ii) when the dispute is one of the conscience.¹

In the words of PARKER, J., in *Deschamps v. Miller*²: “In my opinion the general rule is that the court will not adjudicate on questions relating to the title or the right to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property. Thus in cases of trusts, specific performance of contracts, foreclosure or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or such other unconscionable conduct as I have referred to, the court may very well assume jurisdiction.”³

In order, however, to induce the court to exercise this jurisdiction over disputes as to land outside England, not only must the defendants or some of them be in England and the dispute be matter of conscience and not merely of law, but the court must be the most convenient forum for deciding the dispute. If it is shown that there is a competent court to decide the dispute in the country

¹ *Penn v. Baltimore* (1750), 1 Ves. sen. 444; 20 Digest 235, 31.

² [1908] 1 Ch. 856, at p. 863; 11 Digest 347, 339.

³ See also *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; 11 Digest 349, 349.

where the land is situate, and it would be more convenient to have that court decide it, the English court in exercise of its discretion to refuse to give an equitable remedy will not entertain the action.¹

ARTICLE 149.

Equity forbids Contemplated and undoes Completed Wrongs.

Equity does not permit a wrong to be done which it can prevent; but will forbid the person contemplating such a wrong to soil his conscience by doing it. When the wrong is already done, it will not give the person wronged compensation for the damage done to him, but will order the person who has done the wrong to purge his conscience by undoing it, or if that be impossible, by surrendering to the person wronged all the profits made by the wrong, whether the person wronged has suffered actual damage or not.

The general rule is that a legal remedy cannot be claimed until a legal wrong has been actually suffered. Where in order to make an act or omission a legal wrong actual damage is necessary, then damage resulting from the act must also have occurred before action brought, and the only compensation the court can give is for the damage so suffered.² But an equitable remedy will often be granted before any wrong has been done; and not infrequently no equitable remedy will be granted if the applicant has only applied for it after the wrong is done.

¹ *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453; 24 Digest 772, 8014.

² *West Leigh Colliery Company v. Tunncliffe and Hampson, Limited*, [1908] A. C. 27; 32 Digest 341, 239.

It is on these principles that the remedy by injunction is based.¹

When, however, the wrong has been done before action brought, then if it is a wrong done to the plaintiff's property, under certain circumstances the court will order the defendant to undo it, and where it consists of a breach of contract the court will, under certain circumstances, order the defendant to undo the wrong by performing the contract, or where the contract is negative, by ceasing to break it. It is on this principle that the remedies by specific performance and mandatory injunctions are based.

When, however, the wrong has been done and is not one the court can or will order the wrongdoer to undo, the mode in which the court, when it grants an equitable remedy, estimates the liability of the wrongdoer is altogether different from the mode adopted by the law. Shortly, the law orders compensation and equity orders restitution. In other words, the law estimates the damage done to the plaintiff by the defendant's wrongful act and gives judgment for damages sufficient to compensate him. Equity, on the other hand, does not concern itself with the damage done to the plaintiff: it concerns itself solely with the profits made by the defendant through his wrongdoing. These it holds he cannot in conscience retain; and so it orders him to deliver them up to the plaintiff even when the plaintiff has suffered no actual damages through the wrong.² This is the principle upon which the remedy by account is based.

Where the wrong consists of a tort (or breach of contract) at common law, the court now has under the Judicature Acts power to give common law damages instead of an account, and in actions for accounts in such cases it is customary to claim both an account and damages. But where the injuries alleged were suffered before action brought, on obtaining judgment the plaintiff will be put to his election which remedy he will take. Where the

¹ *Infra*, pp. 443, 456 *et seq.*

² See *Parker v. McKenna* (1874), L. R. 10 Ch. 36; Stra. L. C., p. 620 *Digest* 237, 44.

wrong is only a wrong in equity, damages cannot be given except in lieu of specific performance or an injunction.¹

ARTICLE 150.

Who seeks Equity must do Equity.

Equity considers it contrary to conscience for a plaintiff to seek an equitable remedy in a matter in which he himself has not acted conscientiously; and accordingly, where an equitable remedy in such circumstances is sought, it will either refuse it or will grant it only on condition that the plaintiff himself acts according to conscience.

This is a summing-up of two maxims of equity: firstly, that *he who comes into equity must come with clean hands*; and secondly, that *he who seeks equity must do equity*. Both are based on the principle already stated, that the Court of Chancery was a court of conscience, and therefore saw not merely that the defendant, but that also the plaintiff, acted as a conscientious man would.

A court of law cannot take into consideration the conduct of the plaintiff provided he is acting within the law. Even where his motive is pure malignity, if he has not broken the law he is entitled to his legal remedy.² But as equitable remedies are in the discretion of the court, the court before granting one will inquire whether the plaintiff's conduct in the matter before it has been conscientious, and also whether he himself is prepared to act as a man of conscience towards the defendant. Thus, at law a husband before the Married Women's Property Act, 1882, succeeded to all personalty devolving on his wife during coverture. Where such personalty could be reduced into possession by legal process, the law could not prevent the husband

¹ *Infra*, p. 449.

² *Mayor of Bradford v. Pickles*, [1895] A. C. 587; 36 Digest 65.

appropriating it to his own use ; but where he had to resort to equity to reduce it into possession, equity only helped him on condition he made a reasonable settlement on his wife. This is what is called a wife's equity to a settlement.¹

The rule is limited to the matter in respect of which the assistance of the Court of Equity is asked. It does not extend to authorise the court to impose upon a plaintiff any terms relating to a matter independent of that in respect of which the relief is sought.²

ARTICLE 151.

Delay Defeats Equity.

The remedies given by equity, being outside the law, are not subject of their own nature to the Statutes of Limitation, which fix the periods within which remedies given by the law must be sought. But equity considers it contrary to conscience for plaintiffs to take advantage of this to harass defendants by undue delay in applying for its remedies. Accordingly, if the equitable remedy sought is one alternative or corresponding to a legal remedy, it will apply by analogy to the equitable remedy the Statute of Limitations applicable to the legal remedy ; and, if the equitable remedy is one to which there is no alternative or corresponding legal remedy, then it will refuse the equitable remedy where the plaintiff has been guilty of unreasonable delay in applying for it. Such unreasonable delay is called technically *laches*.

Prompt action to enforce an equitable claim is regarded as an essential condition to equitable relief, or in other

¹ *Supra*, p. 413.

² *Gibson v. Goldsmid* (1854), 3 Eq. Rep. 106 ; 20 Digest 245, 107. For an excellent illustration of the difference between legal and equitable remedies, see *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300 ; 35 Digest 205, 303.

words, unreasonable lapse of time in seeking an equitable remedy will operate as a bar to the right to relief.

Lapse of time will afford a defence to a legal claim only when the remedy has been barred by a Statute of Limitations. Equitable claims, on the other hand, may be barred not only by Statutes of Limitations which apply to them directly, or which in some cases are applied by analogy,¹ but also by the *laches* or unreasonable delay of the plaintiff in seeking equitable relief. This is the meaning of the maxim *Vigilantibus non dormientibus æquitas subvenit*.

The application of this equitable doctrine may be well illustrated in the words of LINDLEY, L.J.: "When a Court of Equity is asked to enforce a covenant by decreeing specific performance or granting an injunction, in other words, when equitable as distinguished from legal relief is sought, equitable as distinguished from legal defences may have to be considered. The conduct of the plaintiff may disentitle him from relief; his acquiescence in what he complains of, or his delay in seeking relief, may of itself be sufficient to preclude him from obtaining it."²

Though mere delay, in asserting an equitable right, may defeat the right of a plaintiff to relief when he has merely an *executory* interest to enforce, such as a trust to be established, or an executory contract to be specifically enforced, yet when a plaintiff has a vested right or is in actual possession of property, and seeks to enforce an *executed* interest, mere *laches* will not of itself deprive the party of equitable relief; nevertheless, in such case he may by "standing by" waive or abandon his right, so that it would not be enforced by a Court of Equity.³ The doctrine of *laches* in Courts of Equity is not, it has been said, an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which

¹ See *In re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502; 32 Digest 518, 1761. See also *Knox v. Gye* (1872), L. R. 5 H. L. 656; 32 Digest 511, 1702.

² *Knight v. Simmonds*, [1896] 2 Ch. 294, at p. 297; 21 Digest 384, 1540.

³ *Clarke and Chapman v. Hart* (1858), 6 H. L. C. 633, at pp. 647, 655; 20 Digest 527, 2506; *Archibald v. Scully* (1861), 9 H. L. C. 360, at p. 383; 32 Digest 464, 1298.

might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material.¹

Thus, for example, where a purchaser seeks to set aside or rescind a contract induced by fraud, he must apply for relief with reasonable diligence, and where owing to delay on his part other parties have acquired rights or the property has deteriorated in value or changed in condition the court will refuse rescission.²

ARTICLE 152.

Chief Equitable Remedies.

Besides the numerous auxiliary remedies which are now equally obtainable in courts of equity and of law, there are five capital remedies which were originally obtainable only in the Court of Chancery, and actions for which will still as a rule be entertained only in the Chancery Division of the High Court. These are: (i) Specific Performance, (ii) Injunctions, (iii) Receivers, (iv) Accounts, (v) Rectification of Written Instruments.

Perhaps it is an overstatement to say that these remedies were originally obtainable only in the Court of Chancery. In very early times the common law judges when on circuit were accustomed to grant remedies very like, at any rate, to most of the five remedies set out in

¹ *Lindsay Petroleum Company v. Hurd* (1874), L. R. 5 P. C. 221, at pp. 239, 240; 20 Digest 529, 2513.

² *Directors of Central Railway Company of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99, at pp. 125, 126; 36 Digest 61, 568.

the above Article. This, however, is true, that it was the Court of Chancery which developed these remedies and gave them their present form and potency ; and before the Judicature Acts any plaintiff seeking them had to bring his case in the Court of Chancery.

Now, though nominally every judge of the High Court has power to grant them, in fact the judges of the Chancery Division have the only machinery capable of framing and enforcing them in anything but the simplest cases, and therefore applicants for them must come to the Chancery Division for them.

Accordingly these five classes of equitable relief, forming as they do important branches of equity jurisdiction at the present time, require special discussion in this part of the work.

In addition to these, however, there were several other kinds of equitable remedies which were formerly obtainable under the concurrent or auxiliary jurisdictions of the Court of Chancery, and which are, under the present system, obtainable in any Division of the High Court. The rescission or setting aside of deeds or other instruments for fraud, undue influence, etc., has already received consideration in the discussion of " Mistake," " Fraud," and " Undue Influence." Other equitable remedies were " Set-Off," *i.e.*, the equitable defence of setting up a countervailing claim to that of the plaintiff ; Interpleader, a proceeding by a person in possession of property in which he claims no interest for the determination of the rights of adverse claimants ; Discovery of facts or documents in the course of an action ; Bills for the perpetuation of testimony ; Bills to take evidences *de bene esse*, in the case of witnesses in ill-health, resident abroad, or too old or infirm to appear before the court ; Bills *quia timet*, for relief in case of apprehended injuries ; Bills of peace to establish in favour of or against a number or class of individuals some right which there was reason for supposing might be subsequently claimed or disputed, the object being to prevent multiplicity of suits. Actions in the nature of Bills *quia timet* and Bills of peace are still maintainable. Most of these remedies were originally obtainable only by substantive proceedings in equity in

the above Article. This, however, is true, that it was the Court of Chancery which developed these remedies and gave them their present form and potency ; and before the Judicature Acts any plaintiff seeking them had to bring his case in the Court of Chancery.

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aid of the defective procedure at law. They are now in many cases regulated by statute, and by rules of court, and since the Judicature Acts may properly be regarded as matters of procedure. Information as to them should therefore be sought in works on Practice and Evidence, rather than in a text-book on the principles of Equity.

ARTICLE 153.

(i) Specific Performance.

The remedy of specific performance consists of an order directing a defendant to carry out literally, or as near literally as is possible, the terms of a positive agreement made between him and the plaintiff, which agreement may, under certain circumstances, be one not enforceable at law by damages.

The common law allowed a party to break a contract and compensated the other party by awarding him damages sufficient to cover any loss which he may have suffered by the breach. Equity, when it gave a remedy in the case of contracts based it on a different principle. It held that a man should not be allowed to soil his conscience by refusing to keep his word ; and therefore the remedy it supplied was an order to the party who wished to commit a breach not to do so, but to carry out the contract so far as it was in his power so to do. This is the remedy called specific performance.

It is to be remembered that this remedy, like other equitable remedies, can be given only where the legal remedy is inadequate.¹ But it is to be noted that it is also given to repair breaches for which the law would give no damages, as, for instance, where in consequence of having entered into an agreement unenforceable at law the applicant party has so changed his position that equity

¹ *Infra*, Art. 162.

cannot be done except by compelling the other party to perform his side of the agreement.¹

ARTICLE 154.

(ii) Injunction.

The remedy of injunction consists of an order directing a defendant (i) not to do an act which he has threatened, or not to continue doing an act which he has already commenced, to do ; or (ii) directing him to undo an act which he has already done. The first kind of injunction is usually called an ordinary or negative, and the second kind a mandatory or positive, injunction.

The remedy of injunction is based on the same principle as other equitable remedies—that equity will not permit a man to soil his conscience by wronging his neighbour. Accordingly, where it is proved that one party is about to commit an act or continue an act which will interfere or interferes with his neighbour's rights, the court will forbid him to proceed. The proper time then to apply for an injunction is before any wrong is done, or where the wrong is a continuing one, as soon as possible after it is commenced. If the application is made later and the result of granting a mandatory injunction would be to throw loss on the defendant, as by compelling him to destroy his works, then, in the absence of proof that an unfair advantage has been taken by the defendant, the court will leave the plaintiff to his remedy in damages.² The legal remedy in damages only arises after the wrong has been done, and so it usually happens that the equitable remedy ceases to exist as soon as the legal remedy arises.

¹ *Infra*, Art. 168.

² *Infra*, Art. 158.

ARTICLE 155.

(iii) Receivers.

The remedy by way of receiver consists of an order appointing a person to receive and to give discharges for debts and other property belonging to a defendant for the purpose of applying what is so received to the satisfaction of claims against the defendant which cannot be satisfied by process of execution.

When a plaintiff was a person having only an equitable claim against legal property—such, for example, as an equitable mortgagee—or where the defendant was a person having an equitable interest in property, such as a cestui que trust, legal process could not be issued to enforce a judgment, since the law did not recognise a merely equitable claim or a merely equitable interest. Accordingly, in order to give a remedy in such cases, the Court of Chancery invented the receivership. In other words, it appointed a person to receive the rents and profits of the legal property until the equitable claim was satisfied out of them or to take over the equitable property till the legal or equitable claim of the plaintiff was satisfied. This was sometimes called equitable execution.

Now the court, as we have seen, has statutory power to appoint receivers in many cases where both the plaintiff's claim and the defendant's property are legal, and the same power is given sometimes as a personal remedy to persons having legal claims against other people's property.

ARTICLE 156.

(iv) Account.

The remedy by way of account consists of an order directing the accounting party to

prepare and submit for the inspection of the court a statement as to the property which he has in fact received in connection with a certain transaction, to which is sometimes added a further direction to explain why he has not in fact received other property which *primâ facie* he should have received ; and to state how he has dealt with such property. Where he is directed to state merely what property he has in fact received, the order is said to be one for a common account ; where he is directed to explain why he has not in fact received property which *primâ facie* he should have received, the order is said to be one for an account on the footing of wilful default.

As has already been said, the principle on which legal remedies are based is compensation for damage done to the plaintiff, while the principle on which equitable remedies are based, where property is concerned, is restitution. The law seized so much of the goods of the wrongdoer as was needed to compensate the plaintiff for the damage which he had suffered through the defendant's wrong. Equity, however, paid no attention to the damage done to the plaintiff : it was concerned only with the injury which the defendant had done himself by doing wrong to his neighbour ; and it sought to undo this by compelling him to give to the person wronged all the profits he had made out of his wrongdoing, however large or small the damage to the plaintiff may have been. It held, in other words, that it would soil the defendant's conscience if he kept ill-gotten gains.

Though the Court of Chancery had no punitive powers, it sometimes went further than this and imputed to the wrongdoer or accounting party the receipt of profits which in fact he had not received. This it did only when it was through the accounting party's negligence or wilful default, as the technical phrase is, that such profits were not received. Where the court assumed that all the profits reasonably recoverable had been recovered by the

accounting party, he was ordered to render a common account—that is, an account of what he had actually received. When it did not assume that but ordered him to show that in fact he had recovered all the profits reasonably recoverable, the account was said to be on the footing of wilful default.¹

ARTICLE 157.

(v) Rectification of Instruments.

(1) Where one or several persons with the object of carrying out a definite intention executes or execute a legal instrument, if such instrument, through being inaccurately expressed, fails to carry out accurately such intention, the court will, on the application of one or all of the persons party thereto and on evidence clearly establishing the intention, rectify the instrument.

(2) Where the instrument is intended finally to settle the rights of the parties thereto, parol evidence as to the intention will be admitted even though the transaction intended to be carried out is one an agreement as to which should, by statute, be evidenced in writing.

Paragraph (1).

Rectification or reformation of written instruments is usually discussed as part of the law as to mistake of fact. There are, no doubt, two kinds of mistake of fact: mistake as to the expression of the intention, and mistake as to the subject-matter of the transaction. But rectification is not always based on mistake. It

¹ *Infra*, p. 531.

is based simply upon this ground : that an instrument which for any reason—say, the fraud or ignorance of the draftsman—does not express the intention of the parties to it will be rectified if the intention can be proved. Thus, in *Cogan v. Duffield*,¹ it was agreed by marriage articles to settle certain moneys. When the settlement came to be drafted the draftsmen introduced limitations into it different from those which the court would, under the circumstances, presume to be intended by the parties. It was held that the settlement must be rectified.

By statute some instruments, however much they fail to express the real intention of the maker or of parties to them, cannot be rectified, as, for example, wills and articles of association.² Such instruments may be voidable through their execution being obtained by fraud, but they cannot be altered by the court on the ground that they do not express the real intention of the parties to them.

As appears from the Article, in order that the court may order rectification three conditions must be fulfilled.

In the first place, the intention must be definite. If the intention is not definite, there is nothing by which the court is able to rectify the instrument. A person who, when executing an instrument, does not know clearly his own mind must be presumed to mean what the instrument he executes expresses. An exception to this occurs in cases like *Cogan v. Duffield*,³ where the court presumes that parties entertain definite intentions which in fact they, as a rule, do not entertain. Again, where there are two or more parties to the instrument, the intention to be definite must, of course, be the common intention of all the parties.⁴

In the second place, the definite intention must subsist at the time of execution. Where documentary evidence exists of the parties' intention some time preceding the execution of the instrument, then this will be *primâ facie*

¹ (1876), 2 Ch. D. 44 ; 40 Digest 484, 321.

² *Evans v. Chapman* (1902), 86 L. T. 381 ; 9 Digest 557, 3691.

³ *Supra*.

⁴ *Bentley v. Mackay* (1862), 4 De G. F. & J. 279 ; 8 Digest 496, 614. See also *Jervis v. Howle and Talke Colliery Co.*, [1937] 1 Ch. 67 ; [1936] 3 All E. R. 193 ; Digest Supp.

evidence of the intention of the parties when the instrument was executed. Thus, if a marriage settlement made after marriage is not in accordance with articles executed before it, the court will, in the absence of express evidence of a change of intention, rectify the settlement to agree with the articles.¹ But if the subsequent settlement shows that disputes have occurred as to the meaning of the articles and that all the parties have agreed to the settlement as a compromise, then the fact that the settlement is not in accordance with the articles is not a ground for rectification.²

In the third place, the intention must be strictly proved. Parol evidence, even when it is the evidence of the settlor only,³ or of one of the parties after the death of the other parties,⁴ may be held sufficient; but the court is inclined to regard such evidence, unsupported by documents, with suspicion.⁵

Paragraph (2).

The case of *Johnson v. Bragge*⁶ is a good example of the admission of parol evidence. There A., being about to marry, wrote to B., his solicitor, for information as to his own present and future means. B. replied mentioning, among other things, that A. had a life estate in £7,000, with a power to settle the same on his intended wife for life, and then on his children, and suggesting he should do this. B.'s letter was handed to C., another solicitor, to prepare marriage articles carrying out B.'s suggestions. C. prepared the articles, which failed, however, to execute the power of appointment so as to give A.'s intended wife a life interest. On A.'s death, the question arose whether A.'s widow took a life interest in the £7,000. It being held that the power was

¹ *Tucker v. Bennett* (1887), 38 Ch. D. 1; 40 Digest 539, 819.

² *Fowler v. Fowler* (1859), 4 De G. & J. 250; 35 Digest 134, 340.

³ *Bonhote v. Henderson*, [1895] 1 Ch. 742; affirmed [1895] 2 Ch. 202; 35 Digest 133, 332.

⁴ *Wollaston v. Tribe* (1869), L. R. 9 Eq. 44; 35 Digest 141, 396.

⁵ *Tucker v. Bennett*, *supra*; *Bonhote v. Henderson*, *supra*.

⁶ [1901] 1 Ch. 28; 35 Digest 139, 376.

not executed, she applied to the court for rectification of the articles, so as to make the articles execute the power. It was objected that, the agreement to settle a life interest on A.'s wife being one in consideration of marriage and not being in writing signed by the party to be charged, the articles could not be rectified as required merely on parol evidence. It was held that they could be so rectified.

It would seem that even where an agreement in writing has been executed by conveyance or lease, extrinsic evidence may now be admitted to prove that the documents do not express the real intentions of the parties. In other words, a conveyance may conform strictly with the terms of an antecedent written contract, and yet the court may rectify the conveyance if it is proved by extrinsic evidence that a mutual mistake was made in reducing the agreement to writing. The result of this may be, in effect, to grant specific performance of a written contract with a parol variation. This rule has been strongly criticised¹; but it appears to be established by authority.²

ARTICLE 158.

Damages in addition to or in lieu of Equitable Remedies.

(1) In an action for an equitable remedy the court may, where it has no jurisdiction to grant such a remedy or in addition to the equitable remedy, also give the plaintiff damages, provided the act or omission of the defendant is one for which damages could be given in a common law action.

¹ See *May v. Platt*, [1900] 1 Ch. 616; 35 Digest 101, 85.

² *Craddock v. Hunt*, [1923] 2 Ch. 136; 42 Digest 564, 1302; *U.S.A. v. Motor Trucks, Ltd.*, [1924] A. C. 196; 42 Digest 564, 1303. It should be noticed, however, that the rule has not yet been confirmed by the House of Lords.

(2) In actions for specific performance or an injunction where the court has jurisdiction to grant these remedies, it may refuse them and grant in lieu of them damages, whether the law could allow damages or not.

(3) Where the court grants damages in addition to granting, or because it has no jurisdiction to grant, the equitable remedy sought, it is acting as a court of law, and assesses the damages on the legal principle that a plaintiff can recover only such damages as result from the defendant's acts or omissions before the writ issued. Where, however, it grants damages in lieu of specific performance or an injunction, it assesses them on the equitable principle which takes into consideration not merely the damages which have resulted from the defendant's past acts or omissions, but also the damages which may result from the defendant's future acts or omissions which the grant of specific performance or of an injunction would have prevented.

Paragraph (1).

This jurisdiction arises under the Judicature Act, which enables every judge of the High Court to give both legal and equitable remedies where justice requires them.

A good example of the court giving damages in an action for an equitable remedy where there were no grounds for granting the equitable remedy sought, and yet where the plaintiff had suffered a legal wrong, is the case of *Behrens v. Richards*.¹

In that case the plaintiff was the owner of a strip of land between the public road and the foreshore of the sea, and the defendant insisted on crossing the plaintiff's land, claiming that there were public rights of way over this land between the road and the foreshore. Plaintiff

¹ [1905] 2 Ch. 614; 1 Digest 39, 310.

asked for an injunction to restrain the defendant trespassing, and the court, in exercise of its discretion, refused the injunction, while holding that there were no public rights of way across the land. As therefore the defendant in crossing the land had committed trespass it gave nominal damages (thirty shillings) for the trespass before action brought.

Paragraph (2).

This jurisdiction was given to the old Court of Chancery by Lord Cairns's Act, 1858.

Equity had no right to award damages for breach of a legal right. Where in such a case an order for specific performance of a contract or an injunction to restrain a tort was asked for and the facts did not justify the court in granting the equitable remedy, all the Court of Chancery could do was to advise the plaintiff to bring an action for damages in a court of common law. Moreover, where it was an equitable right which was interfered with or where no legal wrong had been done before action brought, and the Court of Chancery did not see fit to grant an injunction—on the ground that the injury done to plaintiff was not sufficient to make an injunction necessary¹—then neither it nor a court of common law could grant damages. To prevent the necessity of bringing two actions for a wrong at law and for the purpose of compensating a plaintiff who had suffered a wrong in equity, Lord Cairns's Act was passed conferring on the court the right to give damages in lieu of an order for specific performance or an injunction.²

This Act has now been repealed, but the jurisdiction which it gave to the court has not by that repeal been taken away. Once jurisdiction is given it can only be taken away by a positive enactment to that effect.³

It has been held in *Lavery v. Pursell*,⁴ that in order that damages may be awarded under Lord Cairns's

¹ See *infra*, p. 464.

² See *Eastwood v. Lever* (1863), 4 De G. J. S. 114; 28 Digest 416, 420.

³ *Leeds Industrial Co-operative Society, Ltd. v. Slack*, [1924] A. C. 851; 28 Digest 416, 409.

⁴ (1888), 39 Ch. D. 508; 42 Digest 565, 1310.

Act for an equitable wrong, it must be shown that at the time the writ was issued the facts would have enabled the court to grant specific performance or an injunction.

Paragraph (3).

When damages are given under the Judicature Acts they are assessed only for injuries resulting from a breach of the plaintiff's rights which occurred before action brought.¹ On the other hand, when damages are given under Lord Cairns's Act, the damages are assessed for injuries in the future which may result from the refusal of the court to restrain the defendant from committing further breaches of the plaintiff's rights. The difficulty of assessing these future injuries is so great that the courts for a long time practically refused to put Lord Cairns's Act in operation. This, however, is no longer the case,² but still it is put in operation only when it is clear that any future injury to the plaintiff will be of a minor character.³

ARTICLE 159.

Subject-matter of Equitable Remedies.

The subjects in connection with which these capital equitable remedies are granted may be classed under three heads: (i) Contract, (ii) Tort, and (iii) Administration. These subjects will be treated *seriatim* in detail.

¹ *West Leigh Colliery Company v. Tunnickliffe and Hampson, Limited*, [1908] A. C. 27; 17 Digest 91, 85.

² See *per* Lord MACNAGHTEN in *Colls v. Home and Colonial Stores*, [1904] A. C. 179, at p. 193; 20 Digest 294, 505.

³ And see *infra*, p. 508.

BOOK II.
EQUITABLE REMEDIES.

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SUBJECT - MATTER OF
EQUITABLE REMEDIES.

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INTRODUCTION TO BOOK II (A).

ARTICLE 160.

Enforcement of Agreements by Specific Performance and Injunction.

Agreements, when they are of a positive character, can under certain circumstances be enforced in equity by specific performance, and when they are of a negative character, their breach can under different circumstances be forbidden in equity by injunction.

Specific performance is the proper remedy for the enforcement of a positive contract—that is, a contract which binds the defendant to do something; and injunction is the proper remedy for preventing the breach of a negative contract—that is, a contract which binds the defendant not to do something. With that love for using the same terms to mean different things which distinguishes English lawyers, the term specific performance is often applied equally to the judgment which compels the defendant to do something and the judgment which prevents him doing something. This is unfortunate, since, as we shall see, equity grants injunctions restraining the doing of acts contracted not to be done on quite different principles from those on which it grants specific performance requiring the doing of acts contracted to be done.

This confusion of terms sometimes leads to attempts being made to enforce positive contracts by injunction. Where this is attempted, the rule of equity is that it will not enforce by negative process a contract which it would not enforce by positive process. Thus, in *Powell Duffryn Steam Coal Company v. Taff Vale Railway Company*,¹

¹ (1874), 9 Ch. 331; 28 Digest 362, 9.

the plaintiffs had running rights over the defendants' railway. A misunderstanding arose between the plaintiffs and defendants, and as a consequence the defendants ordered their signal-men not to facilitate the plaintiffs' trains. Thereupon the plaintiffs brought an action for an injunction to restrain the defendants from giving such orders. The court decided that what the plaintiffs really wanted was not an order to forbid the defendants directing their men not to facilitate their trains, but an order to bid them to direct their men to facilitate them. If this had been claimed in an action for specific performance the court would have refused relief¹; and it would not grant it because the action brought was for an injunction.²

ARTICLE 161.

Agreements which Equity will Specifically Enforce.

The agreements which equity will enforce by specific performance consist of two classes: Firstly, agreements for the breach of which the law will give damages; and secondly, agreements for the breach of which the law will not give damages.

There are only two kinds of contracts recognised by the common law, contracts by deed (or specialty contracts) and contracts by parol (or simple contracts). The law merchant does in effect recognise a third kind, written contracts such as bills of exchange; but the common law knows nothing of these. In some cases, however, statute has required that certain contracts for which a deed is not necessary must, to be enforceable, be evidenced by writing. This does not invalidate the parol agreement, but merely makes it unenforceable at law until it can be proved by writing. When it is so proved it does not operate from

¹ See *infra*, p. 464.

² But see *infra*, p. 487 *et seq.*

the time the writing was made, but from the time the parol agreement was made.

Under certain circumstances equity, as we shall see, will enforce specific performance of parol agreements which the law will not enforce because they are not evidenced by writing as required by statute. But there are doubts whether equity can enforce a parol agreement or an agreement in writing where the agreement is one which by common law can only be made by deed. Here the distinction has been drawn that a parol agreement which is unenforceable at law merely because it is not properly evidenced is all the same a legal agreement, while an agreement which by law can be made only by deed, if not so made is not a legal agreement at all. Whether this distinction is theoretically sound or not, it would seem to be settled that where a statute requires certain contracts to be made by deed, if not so made they cannot be specifically enforced,¹ and it is probable that the court would take the same view of a contract which the common law required to be made by deed and would refuse to decree specific performance of it if not so made.

In this connection it is to be remembered that in equity a seal does not import consideration; and therefore specific performance of a contract by deed is never ordered where in fact it is not based on valuable consideration.

¹ *Hoare v. Kingsbury Urban District Council*, [1912] 2 Ch. 452; 42 Digest 461, 298.

BOOK II (A).

Section I. Enforcement of Agreements by Specific Performance.

CHAPTER 1.

AGREEMENTS FOR THE BREACH OF WHICH THE LAW WILL GIVE DAMAGES.

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ARTICLE 162.

Conditions of Specific Performance.

Equity will enforce by specific performance agreements for the breach of which the law will give damages where damages are an inadequate remedy for the breach; provided:

- (i) Specific performance would be an effective remedy for the breach;
- (ii) The court could efficiently supervise the specific performance of the agreement; and

- (iii) The specific performance of the agreement would not inflict undue hardship on the defendant.

The equitable remedy of specific performance lies only where the legal remedy—in this case damages—is not an adequate remedy. Accordingly, where damages are an adequate remedy equity has no jurisdiction to interfere, but where damages are not an adequate remedy it has jurisdiction to interfere and grant its own remedy, specific performance; but it will not interfere unless the other three conditions set out in this Article are fulfilled. In other words, inadequacy of damages is the basis of equity's jurisdiction, the three conditions limit the exercise of that jurisdiction.

ARTICLE 163.

When Damages are an Inadequate Remedy for Breach of Agreement.

Damages are an inadequate remedy for the breach of an agreement where the agreement is one which nobody, or practically nobody, but the defendant, or nobody without his consent, can carry out so as to enable the plaintiff to place himself with the aid of damages in practically the same position as if the defendant had himself carried out the agreement.

It is commonly said that damages are an adequate remedy where the contract relates to something which can be obtained for money in the open market. This seems inadequate. Many things might be obtained in the open market if the other party to the contract consented to their being so obtained. Where he is in a position to prevent any other person carrying out the contract and does so, then damages are not an adequate remedy for the breach.

Thus a contract to build houses is one which can be performed by many people and performed by them equally well, and therefore one which *primâ facie* equity will not specifically enforce. But if the contract is one by which the defendant undertakes to build houses on his own land, then without his consent no one can carry it out. If he refuses, therefore, to carry or permit some one else to carry it out damages are not an adequate remedy, since they will not place the plaintiff in the same position as if the defendant had himself carried out the contract.¹

The most common example of contracts which no one except the defendant can perform are contracts for the sale of land. If A. contracts to sell Blackacre to X., then it is clear that if A. refuses to carry out his contract no other person can put X. in the same position as if A. had carried it out. A. has contracted to convey Blackacre to X.; if he does not convey it, nobody else can. Accordingly all contracts for the sale of land or of an interest in land—such as a lease—are *primâ facie* specifically enforceable in equity.

Let us apply this principle, by citing a few decisions, to three other kinds of contracts: (i) contracts for the sale of chattels, (ii) contracts for loans, (iii) contracts for works.

(i) *Contracts for sale of chattels*.—At one time it was thought that the only contracts of sale which equity would specifically enforce were contracts for the sale of land. But now it is settled that contracts for the sale of specific chattels which can only be obtained from the defendant will also be enforced specifically in equity. The leading case on this point is *Duke of Somerset v. Cookson*,² though this was not really a case of enforcing a contract of sale, but specifically recovering a chattel which belonged to the plaintiff.

The Duke of Somerset as lord of a certain manor was entitled to any treasure trove found upon it. A silver

¹ *Mayor of Wolverhampton v. Emmons*, [1910] 1 K. B. 515; 7 Digest 401, 273.

² (1735), 3 P. Wms. 389; 43 Digest 533, 689.

altar-piece was so found and purchased by the defendant with notice of the Duke's right. The Duke brought a bill in equity demanding delivery of the altar-piece. The defendant demurred on the ground that such a bill lay only for land or for chattels savouring of the land, such as heirlooms and title-deeds. The demurrer was overruled on the ground that specific chattels of a rare and otherwise unprocurable kind could be recovered specifically in equity.¹

But where the chattel contracted to be sold is one which can easily be obtained from others than the defendant, as, for instance, coal, then the wrong done by the defendant in refusing to carry out his contract is a mere matter of money; the plaintiff can buy the chattel from others and claim any greater price which he has to pay as damages against the defaulting contractor, when he will be in the same position as if the defaulting contractor had carried out the contract.²

(ii) *Contracts of loan*.—If A. contracts to lend X. £1,000 and fails to do so, then there are many others who can lend the money; and if X. has to pay a higher interest than A. had contracted to take, damages covering this will place X. in the same position as if A. had lent him the money. So damages for breach of a contract to lend is an adequate remedy; and such a contract will not be specifically enforced by equity.³

A statutory exception has been made to this principle so far as joint stock companies are concerned. By section 76 of the Companies Act, 1929⁴ (re-enacting section 16 of the Companies Act, 1907) "A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance."

(iii) *Contracts for works*.—A contract for works (*locatio-conductio operis*) is to be distinguished from a contract

¹ And see *Hawksley v. Outram*, [1892] 3 Ch. 359; 43 Digest 39, 387.

² *Dominion Coal Company v. Dominion Steel Company*, [1909] A. C. 293; 42 Digest 445, 160. See also *Re Wait*, [1927] 1 Ch. 606; 39 Digest 678, 2644.

³ *South African Territories, Limited v. Wallington*, [1898] A. C. 309; 17 Digest 133, 398.

⁴ 2 Halsbury's Statutes 821.

for work (*locatio-conductio operarum*). The first is not a contract to do personally anything : it is merely an undertaking to produce a certain finished result, as, for instance, to build a house according to plan. A contract for work is, on the other hand, a contract to do personally something, such as to act as the employer's clerk or to paint his picture. Though the latter contract is one which can only be performed by the person undertaking to do it, still for other reasons it is never specifically enforced. The contract for works is not usually specifically enforceable, because as a rule many other persons are always able and ready to produce the thing contracted to be produced for a proper consideration. Where, however, as already stated, the works to be produced can only be produced by the person undertaking to produce them or by others with his consent, *primâ facie* the contract can be specifically enforced against him.

Thus in *Wolverhampton Corporation v. Emmons*,¹ the corporation of Wolverhampton purchased certain lands in the town for the purpose of public improvements. Some of these were resold subject to covenants by the purchasers to build houses according to a general plan on the plots purchased within a certain time. Emmons purchased a plot and contracted to build houses in accordance with the general plan of the corporation. Later he refused to build, and the corporation sued for a mandatory injunction, which was practically the same as specific performance. It was held that specific performance should be granted, since damages would not place the corporation in the same position as if the defendant had built the houses in compliance with the contract.

¹ [1901] 1 K. B. 515; 7 Digest 401, 273. See also *Molyneux v. Richard*, [1906] 1 Ch. 34; 30 Digest 416, 785.

ARTICLE 164.

Where Specific Performance is an Effective Remedy.

Specific performance will be an effective remedy where it can be put in operation in time substantially to perform the agreement and where by the terms of the agreement the defendant is not in a position legally to determine the agreement before it can be substantially performed.

Formerly, when the court was less swift in its remedies, there were doubts whether it would enforce contracts for lettings for short terms ; but now there seems to be no fixed limit. In *Lever v. Koffler*,¹ an agreement to let for one year certain and then from year to year was enforced specifically, and in giving judgment BYRNE, J., said that in a proper case an agreement for even a shorter term would be specifically performed.

The commonest cases where specific performance is not an effective remedy arise in connection with contracts which for some reason may be legally determined by the defendant. Thus, where a contract is revocable on notice, equity will not specifically enforce it,² or where it can in effect be determined by the defendant, as where the agreement is to grant a lease and the plaintiff has before the lease is granted done acts which by the terms of the lease entitled the defendant to forfeit it.³

In the same way, if time is made of the essence of a contract and there is failure to carry out the contract within the time fixed, the court cannot after that specifically enforce the contract. Thus, in *Steedman v. Drinkle*,⁴ an agreement in writing for the sale of land

¹ [1901] 1 Ch. 543 ; 30 Digest 399, 624.

² *Sturge v. Midland Railway Company* (1858), 6 W. R. 234 ; 42 Digest 453, 238.

³ *Swain v. Ayres* (1888), 21 Q. B. D. 289 ; 30 Digest 394, 574.

⁴ [1916] A. C. 275 ; 42 Digest 513, 778.

required that the price should be paid in instalments, and on failure to pay an instalment at the date fixed the vendor might cancel the contract. Failure to pay an instalment took place, and the vendor determined the contract. The purchaser claimed specific performance. It was held that the court had no power to order it and that the vendor was entitled to retain the instalments which had been paid.

ARTICLE 165.

When the Court can Efficiently Supervise the Performance of an Agreement.

The court can efficiently supervise the specific performance of an agreement where the agreement is not one which depends for its effective execution upon the personal skill or will of the defendant, or where it is not so vague in its obligations as to make the question of its effective execution a matter of taste or opinion.

The practice of the court has varied as to the principle set out in the above Article. At one time it seemed inclined to refuse absolutely to endeavour to enforce any contract which involved more than one act on the part of the defendant, such as the execution of a deed. Now the tendency is to enforce any contract, however many acts its execution may involve, where damages will not be an adequate remedy, unless the contract is one the performance of which is a proceeding which it is beyond the power of the court to supervise effectively.

All contracts for personal service are of this nature : one can bring a horse to the water but nobody can make him drink. The case of *Lumley v. Wagner*¹ is a good illustration of this. Madam Wagner contracted to sing

¹ (1852), 1 De G. M. & G. 604 ; 42 Digest 915, 107. As to the possibility of obtaining an injunction in such cases, see *post*, p. 487 *et seq.*

for some seasons in the plaintiff's opera house. During the currency of the contract she agreed with another impresario to cease to sing for the plaintiff and to sing for her new friend. The plaintiff applied for specific performance of the lady's contract to sing for him. It was held that although this was a contract for the breach of which damages were not an adequate remedy, nevertheless equity could not specifically enforce it, since if it ordered specific performance it could not supervise effectively the carrying out of its own judgment.

Contracts which are not contracts for personal service in the strict sense, that is contracts which do not create the relation of master and servant (*locatio-conductio operarum*), but the execution of which nevertheless depends on the personal skill and disposition of the party who is to do the work, such as contracts to write books, to paint portraits, etc., are not specifically enforceable on the same ground: the court cannot effectively supervise their proper execution.

ARTICLE 166.

When Hardship will Prevent Specific Performance.

Whether the hardship which will arise through the specific performance of an agreement is so undue as to induce the court to refuse an order for specific performance is in every case a question of fact; but generally the court will not order specific performance of an agreement where, if the agreement were enforced, the defendant would not get substantially what he thought he was to get when he entered into the agreement or might be exposed in consequence to civil or criminal proceedings at law.

The court will refuse to enforce the specific performance of a contract where to decree its performance would be to compel a person who has entered inadvertently into it to commit a breach of duty, as where trustees have entered into a contract the performance of which would be a breach of trust.¹ Again, the court, in its discretion, would not compel a purchaser to accept a property which, if he took no steps to prevent it, would by reason of its state (*e.g.*, if it were a brothel) at the time of the sale expose him as owner to criminal proceedings. In such a case the court at any rate would not force specific performance upon an innocent purchaser, though it might be otherwise if the purchaser knew, or ought to have known, the state of the property at the time of the contract.²

When the court refuses specifically to enforce a contract on the ground of hardship it does not thereby rescind it. When a contract is rescinded the parties to it are placed as nearly as possible in the position they would be in had no contract been made. When, however, the court merely refuses to enforce a contract, the contract remains and the plaintiff is left to his remedy by recovery of damages at law. "I conceive the doctrine of the court to be this," said Lord LANGDALE in the case of *Wedgwood v. Adams*,³ "that the court exercises a discretion in cases of specific performance, and directs a specific performance, unless it should be what is called highly unreasonable to do so. What is more or less reasonable is not a thing that you can define, it must depend on the circumstances of each particular case. The court, therefore, must always have regard to the circumstances of each case, and see whether it is reasonable that it should by its extraordinary jurisdiction interfere, and order a specific performance, knowing at the time that if it abstains from so doing a measure of damages may be found and awarded in another court. Though you cannot define what may be considered unreasonable by way of general rule, you may very well, in

¹ *Delves v. Gray*, [1902] 2 Ch., at p. 611; 42 Digest 465, 324.

² *Hope v. Waller*, [1900] 1 Ch. 257, at p. 260; 42 Digest 469, 378.

³ (1843), 6 Beav. 600, at p. 605; 42 Digest 468, 364.

a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." "In cases of specific performance," said Cotton, L.J., in *Preston v. Luck*,¹ "the court does not grant that special equitable relief if it finds for any reason that it would be what is called a hardship, or unreasonable to compel the defendant specifically to perform the contract."

On this principle, in a contract for the sale of land where the vendor is unable to give a holding title to the purchaser the court will, in the exercise of its discretion, refuse to decree specific performance of the contract, but will leave the parties to their remedies at law.²

Where in fact any circumstances outside the written contract and independent of it can be shown to exist which would make a decree for specific performance inequitable, the court would not grant such relief.³

ARTICLE 167.

Reciprocity of Remedies.

(1) Where an agreement is such that damages would not be an adequate remedy to one party to it for its breach, equity will specifically enforce it, not merely on the application of that party, but also on the application of the other party, though so far as he is concerned damages would be an adequate remedy for its breach.

(2) Where the agreement is one for the breach of which damages is not an adequate remedy, then, if for any special reason equity would not enforce it against one party, it will not as a rule enforce it against the other party.

¹ (1884), 27 Ch. D. 497, at p. 506; 42 Digest 482, 502.

² *In re Scott and Alvarez's Contract*, [1895] 2 Ch. 603; 42 Digest 427, 10.

³ See *Clowes v. Higginson* (1813), 1 V. & B. 524, per PLUMER, V.-C., at p. 527; 42 Digest 481, 488.

This may be said to be a summing-up of what is commonly known as the doctrine of mutuality. This doctrine seems to have been first enunciated by Lord REDESDALE in *Lawrenson v. Butler*,¹ and has not been altogether acquiesced in either by the bench or by text writers.² It must be admitted that there are many exceptions more especially to the second part of it.

Paragraph (1).

The commonest example of this is in the case of a contract for the sale of land. It may reasonably be contended that so far as the vendor is concerned damages would be a sufficient remedy; nevertheless equity will specifically enforce it on his application just as much as on the application of the purchaser. Of course it may be contended that ownership of land carries with it duties as well as rights, and that the vendor cannot rid himself of these duties except by having the contract of sale carried out specifically; but this would hardly apply in the case of a mere letting of land, and it would not apply at all to the case of a contract to sell a rare chattel; and still it can hardly be argued that in these cases the court would refuse to enforce specifically the contract at the vendor's request.

Paragraph (2).

The commonest example of this doctrine is that of a contract of sale by a minor. Equity will not specifically enforce such a contract at the minor's suit where it would not enforce it at the suit of the other party against the minor.³ In the same way, damages might not be an adequate remedy for say an editor who in breach of contract is dismissed from his appointment; but nevertheless, since equity would not specifically

¹ (1802), 1 Sch. & L. 13; 42 Digest 437, 91 ii.

² See Ashburner's *Equity*, 2nd ed., pp. 404, 405.

³ *Flight v. Bolland* (1828), 4 Russ. 298; 42 Digest 438, 93. See also *Lumley v. Ravenscroft*, [1895] 1 Q. B. 683; 30 Digest 402, 657.

enforce the contract if he refused to carry it out, it will not specifically enforce it in his favour.¹

The doctrine, if it really is an established doctrine, is notable chiefly by the multitude of cases to which it does not apply. Thus, when a contract which should be evidenced in writing under section 4 of the Statute of Frauds, 1677,² or section 40 of the Law of Property Act, 1925,³ is so evidenced by a memorandum signed only by one of the parties, that party can have it specifically enforced against him although he, having no note or memorandum signed by the party to be charged, cannot enforce it against the other party.⁴ And not infrequently a purchaser can enforce specifically a contract for the sale of land which the court would not enforce on the application of the vendor.⁵

It is to be remembered that in equity a seal does not as in law import valuable consideration (as the ordinary and very inaccurate phrase is); and so equity will not specifically enforce a contract under seal whatever its nature unless it is based on actual consideration.

¹ *Baird v. Wells* (1890), 44 Ch. D. 661; 8 Digest 512, 39.

² 3 Halsbury's Statutes 583.

³ 15 Halsbury's Statutes 216.

⁴ *Martin v. Mitchell* (1820), 2 J. & W. 413; 42 Digest 466, 349.

⁵ See *infra*, Articles 172, 173.

BOOK II (A) (I): ENFORCEMENT OF
AGREEMENTS BY SPECIFIC PER-
FORMANCE (*continued*).

CHAPTER 2.

AGREEMENTS FOR THE BREACH
OF WHICH THE LAW WILL NOT
GIVE DAMAGES.

SUMMARY.

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ARTICLE 168.

**Conditions under which Equity enforces
specifically Agreements for whose
Breach the Law gives no Remedy.**

Where the law requires for their proof that agreements of a certain kind must be evidenced in a particular way, then if they are not evidenced in that way the law cannot give damages for their breach; but if they are agreements which, if evidenced in the way the law requires, equity would have specifically enforced, then though they are not so evidenced equity will specifically enforce them, provided :

- (i) They have been part performed by the party applying for their specific performance or his agent, or
- (ii) They are not evidenced in the way required by the law owing to the fraud of the party resisting their specific performance or his agent.

As has already been pointed out, the specific performance by equity of agreements for the breach of which the law will not give damages concerns principally agreements within section 4 of the Statute of Frauds¹ or section 40 of the Law of Property Act, 1925.² But it is to be noted that equity will specifically enforce only agreements not in writing within those sections where they are agreements which, if they had been in writing, it would have specifically enforced. The sections include agreements of executors to answer damages out of their own estate, agreements to guarantee other people's debts or defaults, agreements in consideration of marriage, agreements for the sale or other disposition of lands or any interest in or concerning them, and agreements not to be performed within a year. Among these, contracts for sales of lands or interests in them are the only ones which equity usually specifically enforces, and in some of the cases it is laid down that these are the only agreements to which the doctrine of part performance applies.³ This view is questioned, however, by Lord SELBORNE, L.C., in *Maddison v. Alderson*.⁴ And it is laid down by KAY, J., in *McManus v. Cooke*,⁵ that "probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing." He adds, however, that "the most obvious case of part performance is where the defendant is in possession of land of the plaintiff under the parol agreement." In *McManus v. Cooke* he held that a parol

¹ 3 Halsbury's Statutes 583.

² 15 Halsbury's Statutes 216.

³ *Britain v. Rossiter* (1879), 11 Q. B. D. 123; 12 Digest 123, 810.

⁴ (1883), 8 App. Cas. 467, at p. 474; 12 Digest 161, 1176.

⁵ (1887), 35 Ch. D. 681, at p. 697; 12 Digest 171, 1251.

agreement for an easement, though an easement was not an interest in land within section 4 of the Statute of Frauds, 1677,¹ was capable of being part performed so as to make it specifically enforceable.

In the second place, the doctrine of specific performance by equity of agreements not enforceable at law because they are not evidenced in writing is based on just the same principle as applied to the enforcement of trusts not declared in accordance with the Statute of Frauds or the Wills Act, namely, that equity will not allow the law to be made a shield for fraud.² In the words of Lord CRANWORTH, L.C., in *Caton v. Caton*,³ "When one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as, for instance, by taking possession of land and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract in the faith of which he induced or allowed the person contracting with him to act and expend money."

Accordingly the party who applies for specific performance of the agreement must, to make out a case, be the party who has changed his position in consequence of the agreement. Thus part performance of a parol agreement by one party gives the other party no cause of action.

As a rule, most acts of part performance are the acts of both parties, as, for example, the delivery and acceptance of possession of the land agreed to be dealt with.⁴ But where the part performance is by one party only, he alone can claim specific performance on the strength of it. Thus, in *Caton v. Caton*,⁵ A. and B., about to marry, agreed in writing that A., the husband, should have the wife's property for his life, he allowing her £80 a year pin money and she having the property at his death. Subsequently after marriage they agreed verbally that there should be no settlement by deed, and that A. should by his

¹ 3 Halsbury's Statutes 583.

² *Ante*, p. 73.

³ (1886), L. R. 1 Ch. 137, at p. 148; 12 Digest 153, 1068.

⁴ *Attorney-General v. Biphosphated Guano Company* (1879), 11 Ch. D. 327, at p. 331; 26 Digest 283, 185.

⁵ *Supra*.

will leave to B. the property which accrued to A. in her right. He made a will to this effect, but subsequently revoked it. It was held that the execution of the first will by A. was no part performance to bring the parol agreement within the rule, as no "consequences can be attached to acts of part performance by the party sought to be charged."

It is often said that specific performance of an oral agreement, which by the Statute of Frauds or the Law of Property Act¹ should be evidenced in writing, will be granted where the defendant failed to plead the statute. This, however, is not a principle of law but merely a rule of practice. By Ord. 19, r. 15, of the Rules of the Supreme Court a defendant must plead in his defence all the matters on which he intends to rely at the trial, and if he relies on a statute he must plead it, whether it is the Statute of Limitations or the Statute of Frauds. But, like other rules of practice, the court may suspend this and allow the defendant to amend his defence by pleading the statute where it would be unfair to him to forbid him to rely on the statute.²

ARTICLE 169.

What amounts to Part Performance of such an Agreement.

In order that an act of a party applying for specific performance of an agreement not evidenced in writing as required by law should be such an act as will justify the court in ordering specific performance, it must be not merely an act in fact intended to carry out the contract, but also an act—

- (i) which can be explained only on the assumption that an agreement relating

¹ 3 Halsbury's Statutes 583; 15 *ibid.* 216.

² See *Brunning v. Odhams* (1896), 75 L. T. 602; 26 Digest 53, 387.

to the subject-matter of the act had been made between the party applying for and the party opposing specific performance before the act was done, and

- (ii) the act done must be one which cannot be undone so as to place the party doing it in the same position as if it had never been done.

(i) Acts done in pursuance of the parol agreement, in order to constitute part performance of it within the rule, must, in the words of Lord HARDWICKE in *Gunter v. Halsey*,¹ "be such as could be done with no other view or design than to perform the agreement, the terms of which must be certainly proved." Or, as expressed by Lord SELBORNE in *Maddison v. Alderson*,² "All the authorities show that the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged."

Thus, for example, the letting of a purchaser or tenant under a parol agreement into possession of the land is an act of part performance on the part of both parties.³ The permitting, however, a tenant in possession to remain in possession after his tenancy has determined is an equivocal act,⁴ unless qualified by the payment of a different rent⁵ or some other variation of incident. Again, where there is a parol agreement between A. and B. that A. shall build a house on A.'s land according to a certain plan on condition that B. shall, on completion, buy the land and house at a certain price, A.'s building the house is an equivocal act.⁶ If, however, B., while A.

¹ (1739), Amb. 586; 12 Digest 169, 1235.

² (1883), 8 App. Cas. 467, at p. 479; 12 Digest 161, 1176.

³ *Attorney-General v. Biphosphated Guano Company*, *supra*.

⁴ *Wills v. Stradling* (1797), 3 Ves. 378; 30 Digest 387, 511.

⁵ *Miller and Aldworth, Limited, v. Sharp*, [1899] 1 Ch. 622; 30 Digest 387, 513.

⁶ *Per* KEKEWICH, J., in *Dickenson v. Barrow*, [1904] 2 Ch. 339, at p. 342; 40 Digest 40, 237. But cf. *per* Lord CRANWORTH in *Caton v. Caton*, *supra*.

was building the house, inspected it from time to time and gave directions for alterations which A. carried out, then obeying such directions would be sufficient part performance.¹ Investigation of title or other preliminary acts are equivocal, and so is payment of a part, or, it would seem, the whole of the purchase money.² The ground upon which the payment of the purchase money is held to be equivocal is not very clear. It would be, perhaps, best to place it on the ground on which it is put in the Article—namely, as an act which does not, on being undone, cause the doer unliquidated damage. On repayment with interest of the purchase money the party paying it is precisely in the same position as he was before he entered into the parol agreement. In all cases where an act has been held sufficient part performance the party has altered his position in consequence of the parol agreement in a way which cannot be assessed accurately in money loss. Such acts, as was said by Lord SELBORNE in *Maddison v. Alderson*,³ “have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land.”

As showing the weight put by the court upon the first of these (possession), the case of *Hodson v. Heuland*⁴ may be referred to. There a contract for a lease of land for more than three years was drafted but never signed, as required by section 4 of the Statute of Frauds.⁵ Before the date of the contract, and therefore not in pursuance of it, the intended lessee had been let into possession, and he continued in possession after the date and paid rent in accordance with the draft lease. It was held that the continuing in possession and payment of rent after the date of the contract was a part performance of it.

(ii) The most ordinary example of acts which may be undone is paying part or the whole of the agreed purchase money as a deposit to secure an oral contract. This,

¹ *Dickenson v. Barrow*, *supra*, followed in *Rawlinson v. Ames*, [1925] Ch. 96; 30 Digest 382, 457.

² *Clinan v. Cooke* (1802), 1 Sch. & Lef. 20.

³ (1883), 8 App. Cas. at p. 480; 12 Digest 161, 1176.

⁴ [1896] 2 Ch. 428; 30 Digest 386, 499.

⁵ 3 Halsbury's Statutes 583.

though clearly inexplicable except on the ground that some agreement has been entered into between the parties, is an act that can be undone so as to place the parties in such a position as if it had never been done. It has been doubted whether the payment of the whole price is not a sufficient act of part performance to enable the court specifically to enforce the agreement,¹ since in equity on the payment of the whole price the vendor becomes a trustee of the property sold for the purchaser; but the weight of authority is against that view.² Since, however, when the whole price is paid a trust in favour of the purchaser arises, it seems to be settled that the court can make an order under section 41 of the Trustee Act, 1925, vesting the property in the purchaser.³

ARTICLE 170.

Preventing Legal Proof by Fraud.

Where one party to an agreement has deliberately prevented the provision of the evidence required by law to prove it, with the intention of taking advantage of the other party to the agreement, and has thereby prejudiced the other party, then in an action by the other party for specific performance of the agreement the court will not allow the party who prevented the provision of the evidence to plead that owing to its absence the agreement cannot be enforced.

Two cases will be sufficient to illustrate this principle. The first is *Lester v. Foxcroft*.⁴ Here a landowner agreed verbally with builders to grant long leases as soon as the builders had pulled down the old buildings

¹ See *Hughes v. Morris* (1852), 2 D. M. & G. 349, at p. 356; 40 Digest 37, 215.

² *Supra*, p. 476.

³ *In re Ruthven's Trust*, [1906] 1 I. R. 236.

⁴ (1700), Colles Par. Cas. 108.

on a certain plot of his ground and erected new ones. The builders entered on the land, removed the buildings and erected others as agreed. They then submitted a draft lease, which was approved by the landowner subject to certain trifling alterations. While these alterations were being made the landowner became very ill, and made his will leaving the plot of ground in question to the defendant, his son. When the builders brought back the lease altered and engrossed the defendant would not allow them to see the landowner, who was nearing death. On the death of the landowner the defendant repudiated the agreement and claimed the land with the houses erected on it by the builders. The House of Lords ordered the defendant to execute the lease as his father would have done had the defendant allowed the builders to submit it to him.

The other case, *Montacute v. Maxwell*,¹ is somewhat peculiar, since it applies to another agreement within section 4 of the Statute of Frauds,² namely, an agreement made in consideration of marriage. There Viscountess Montacute being about to marry the defendant, he and she entered into a verbal agreement that he should execute a deed settling her property on her for her separate use after marriage. The settlement was not ready for execution when the day fixed for the wedding arrived, and the defendant induced the plaintiff to marry him, pledging his word of honour that he would execute the settlement as soon as it was ready to be executed. After marriage he refused to execute it, and in an action by his wife for specific performance pleaded that the agreement, being one coming within section 4 of the Statute of Frauds, must be evidenced in writing before it could be enforced. The court held that the husband by repudiating his agreement, after inducing the plaintiff by means of it to marry him, was guilty of fraud, and therefore it would not permit him to rely on the statute.

¹ (1720), 1 P. Wms. 616; 12 Digest 167, 1217.

² 3 Halsbury's Statutes 583.

BOOK II (A) (I): ENFORCEMENT OF
AGREEMENTS BY SPECIFIC PER-
FORMANCE (*continued*).

CHAPTER 3.

SPECIAL KINDS OF SPECIFIC
PERFORMANCE.

SUMMARY.

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ARTICLE 171.

Specific Performance with Variation.

An agreement which to be enforceable at law must be evidenced in writing may, when so evidenced, be varied by parol agreement. When so varied, in the absence of part performance, the parol variation cannot be specifically enforced, nor can the agreement as evidenced in writing. But if one party to the agreement seeks specific performance of the agreement as evidenced in writing and the other party resists specific performance on the ground that the agreement was afterwards varied by parol, and sets out in his defence what the variation was, the party applying for specific performance can adopt the variation as set out in the defence

and ask for specific performance of the agreement as so varied.

A contract made by deed may be revoked or altered only by deed. A simple contract reduced into writing, even where required by law to be so reduced before it is enforceable, can be revoked or altered by subsequent verbal agreement. Where it has been so revoked or altered the verbal revocation is a good defence to a claim for specific performance of the contract as reduced into writing, and so is a verbal alteration. But if the plaintiff claims specific enforcement of the contract as reduced into writing, and the defendant pleads that the written contract was subsequently varied by verbal agreement in certain respects, the plaintiff can admit this variation in his reply and ask the court to enforce the contract as varied in the manner set out in the defence.¹

This doctrine is to be distinguished from rectification of written instruments. In rectification the plea is that the written instrument, from a mistake or misunderstanding, did not set out the real contract between the parties. In the case of specific performance with variation the plea is that the written instrument did represent the real contract, but that contract was subsequently altered by parol agreement.

In this connection, perhaps, it should be noted that the fact that a plaintiff claims specific performance of a contract written or otherwise on a wrong interpretation of its terms does not prevent his claiming specific performance of it on the interpretation placed upon it by the court.²

Of course, if the contract so altered has been part performed, then it can be specifically enforced like any altogether parol contract.

¹ See *Smith v. Wheatcroft* (1878), 9 Ch. D. 233; 42 Digest 523, 877.

² *Berners v. Fleming*, [1925] Ch. 264; 42 Digest 483, 503.

ARTICLE 172.

Specific Performance with Compensation.

Where the agreement is one for the sale of land, if the vendor is unable to transfer to the purchaser the land precisely as it is described in the agreement, the court will nevertheless, on the vendor's application, enforce specifically against the purchaser the agreement, provided :

- (i) The vendor can transfer the land substantially as described in the agreement ;
- (ii) The extent of the vendor's failure to transfer the land precisely as described in the agreement is capable of being estimated in money ; and
- (iii) The failure to transfer the land precisely as described in the agreement is not due to the fraud or wilful default of the vendor.

When the court makes such an order for specific performance it directs that the extent of the vendor's failure to transfer shall be assessed in money, and that the vendor shall compensate the purchaser to the amount of such assessment.

When the vendor can substantially, but not literally, perform his contract, the purchaser is entitled to compensation in respect of the difference between the property which the vendor compels him to take and the property as described in the contract. This difference must, of course, be capable of assessment in money. If it is of such a nature that the court cannot say what compensation the purchaser should receive for it, then the court

cannot grant specific performance with a speculative compensation.¹

The right of the purchaser to compensation is usually provided for in the conditions of sale. In the absence of any condition for compensation the difference between what the vendor contracted to do and what he can actually do is the subject of compensation. For example, if a leasehold interest of twenty years and nine months has in the contract been represented as a lease for twenty-one years, the vendor can compel specific performance, but the purchaser has a right to be compensated in respect of the difference of the three months.² So where on the purchase of property by a tenant in possession it was described as being forty-six feet in depth, whereas in fact it was only thirty-three feet, the deficiency was held to be a subject for compensation.³ On the same principle the existence of trifling incumbrances, such as a liability to a quit-rent, does not deprive the vendor of his right to specific performance. The vendor's right to insist upon specific performance with compensation exists, however, only in the case of a non-essential defect, and not where the defect is essential or material, as where the tenure of the property is different from that expressed in the contract. Nor can the vendor enforce the contract with compensation for a non-essential defect where he has knowingly misrepresented the property.

The conditions of sale frequently contain conditions as to compensation. A usual condition is that errors or misdescriptions in the particulars or conditions of sale shall not annul the sale, but shall entitle the purchaser to compensation. The principles above stated are applicable; thus where a purchaser will get substantially what he has contracted to buy, he will be compelled to complete with compensation even though there be a deficiency of quantity, provided that such deficiency does not affect the substance of contract he has bargained for.⁴

¹ *Rudd v. Lascelles*, [1900] 1 Ch. 915; 42 Digest 577, 1426.

² *Mortlock v. Buller* (1804), 10 Ves. Jun. 291, *per* Lord THURLOW, at p. 305; 42 Digest 428, 19.

³ *King v. Wilson* (1843), 6 Beav. 124; 42 Digest 575, 1402.

⁴ *Re Fawcett and Holmes* (1889), 42 Ch. D. 150; 42 Digest 571, 1365.

Another condition frequently is that there shall be no right to compensation in respect of any error of measurement. But, notwithstanding any such condition, if the error be material, or the result of misrepresentation calculated seriously to mislead a purchaser, the vendor cannot obtain specific performance.¹ The principle of compensation, whether there be a condition or not, will not be applied where there has been any intentional misrepresentation, even though the difference be of such a character that if it had arisen from mere error it would have been the subject of compensation.²

Moreover, notwithstanding any condition for compensation, if a contract contains a misdescription in a material and substantial point so far affecting the subject-matter of the contract as that it may be reasonably supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause for compensation.³ Similarly, a condition as to compensation has been held not to extend to any defect of title, but merely to error or misstatement in the subject-matter of the sale.⁴

ARTICLE 173.

Specific Performance with Abatement.

Where the agreement is one for the sale of land, if the vendor is unable to transfer to the purchaser the land altogether as it is described in the agreement, the court will nevertheless, on the purchaser's application, enforce specifically against the vendor the agreement so

¹ *In re Terry and White's Contract* (1886), 32 Ch. D. 14; 42 Digest 427, 17; *Jacobs v. Revell*, [1900] 2 Ch. 858; 42 Digest 573, 1384.

² *Price v. Macaulay* (1852), 2 De G. M. & G. 339; 42 Digest 476, 450.

³ *Per TINDAL, C.J.*, in *Flight v. Booth* (1834), 1 Bing. N. C. 370, at p. 377; 40 Digest 106, 842.

⁴ *Debenham v. Sawbridge*, [1901] 2 Ch. 98; 40 Digest 110, 872. See also *In re Russ and Brown's Contract*, [1934] Ch. 34; Digest Supp.

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⁴ *Debenham v. Sawbridge*, [1901] 2 Ch. 98; 40 Digest 110, 872. See also *In re Russ and Brown's Contract*, [1934] Ch. 34; Digest Supp.

far as the vendor can perform it, provided the extent of the vendor's failure to transfer the land as described in the agreement is capable of being estimated in money.

When the court makes such an order for specific performance it directs that the extent of the vendor's failure to transfer shall be assessed in money, and that the price payable by the purchaser shall abate by the amount of such assessment.

When the vendor has not got the whole interest which he is under contract to convey, he is not, as a rule, able to enforce the contract. On the other hand, under these circumstances, the purchaser generally has the right to insist upon taking the partial interest which the vendor can convey, with abatement of the agreed price by way of compensation for the difference.¹ Such relief will not, it seems, be granted where the actual subject-matter which the vendor can convey is substantially different from that stated in the contract.²

This jurisdiction to enforce the contract specifically with compensation for defects where the contract contains no terms as to compensation, is based upon the equitable estoppel that where a vendor by contracting to sell an estate as his own has represented that it is within his power to convey the estate as described, and the purchaser has relied upon such representation, the vendor is precluded from afterwards saying that he has not got the entirety, and, therefore, the purchaser shall not have the benefit of his contract.³

This mode of relief by decree of specific performance with abatement is not, however, granted to a purchaser in any case in which it would involve hardship, or in which it would operate unreasonably, unjustly, or inequitably. Thus it would be refused when the part

¹ *Mortlock v. Buller* (1804), 10 Ves. Jun. 291, at p. 315; 24 Dig. 428, 19; *Barker v. Cox* (1876), 4 Ch. D. 464; 42 Digest 579, 1450.

² *Rudd v. Lascelles*, [1902] 1 Ch. 815; 42 Digest 577, 1426.

³ *Mortlock v. Buller*, *supra*; *Rudd v. Lascelles*, *supra*.

performance of the contract would be prejudicial to third parties¹; or if the purchaser was from the first fully aware of the defect in the vendor's title²; or when the misdescription of the subject-matter of the sale has been corrected at the auction.³ Nor would this relief be available to a purchaser when a condition exists which enables the vendor to annul the sale on the purchaser making, or insisting upon, a requisition with which the vendor may be unable or unwilling to comply,⁴ for the vendor may reserve the right to rescind rather than to complete with compensation. But even when so protected the vendor could not annul the sale under the condition if he had no title whatever to the property sold,⁵ and in the exercise of the power he must act reasonably and not arbitrarily.⁶

¹ *Thomas v. Dering* (1837), 1 Keen, 729; 42 Digest 471, 395.

² *Castle v. Wilkinson* (1870), L. R. 5 Ch. 534; 42 Digest 577, 1425. See also *In re Childe and Hodgson's Contract* (1906), 54 W. R. 234; 40 Digest 158, 1264.

³ *In re Hare and O'More's Contract*, [1901] 1 Ch. 93; 40 Digest 214, 1811.

⁴ See *In re Deighton and Harris's Contract*, [1898] 1 Ch. 458; 40 Digest 92, 712.

⁵ *In re Jackson and Haden's Contract*, [1905] 1 Ch. 603; 40 Digest 95, 734.

⁶ *In re Starr-Bowkett Building Society* (1889), 42 Ch. D. 375; 40 Digest 96, 741.

BOOK II (A).

Section II. Injunctions to Restrain
Breaches of Contract.

SUMMARY.

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ARTICLE 174.

As between Parties to the Contract.

(1) Where a party to a contract expressly undertakes for valuable consideration not to act in a certain way the court will usually enforce this negative undertaking by injunction without proof that the other party would suffer damage if the undertaking were broken. Where, however, the party has not expressly undertaken not to do the act which he contemplates doing, but such act is inconsistent with his doing some act which by the contract he has undertaken to do, then the court will take into consideration the damage likely to result from the doing of the contemplated act, and in general it will not forbid it if the positive undertaking is one which it would not specifically enforce.

(2) Where the contract is one in restraint of trade, even where the negative covenant is express, the court will enforce it only if its

enforcement is necessary for the protection of the interests of the other party to the contract.

Paragraph (1).

"If," said Lord CAIRNS, L.C.,¹ "parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance by the court of that negative bargain which the parties have made, with their eyes open, between themselves."

This rule is based on the principle that the Court of Chancery is a court of conscience: when one has contracted for value not to do a certain act, to do it afterwards is a breach of faith. It was carried very far in the case of *Lumley v. Wagner*,² where it was held to apply to a negative undertaking which was merely subsidiary to a positive undertaking which the court would not specifically enforce. There a singer contracted to sing for an opera and not to sing, without the permission of the owner of the opera, for any other opera during a period of three months. She afterwards during that period entered into an agreement to sing for another opera. The agreement to sing was not one which the court would specifically enforce, yet the court enforced by injunction the agreement not to sing. This case has provoked much discussion; but subsequent decisions have shown that its principle has not so wide an application as at one time was supposed. Thus it has been held that an injunction

¹ *Doherty v. Allman* (1878), 3 A. C. 709, at p. 720; 28 Digest 364, 14. See also *London County Council v. Hutter*, [1925] 1 Ch. 626; 31 Digest 166, 2994.

² (1852), 1 De G. M. & G. 604; 28 Digest 452, 706. See also *Warner Bros. v. Nelson*, [1937] 1 K. B. 209; [1936] 3 All E. R. 160; Digest Supp.

will not be granted to restrain the breach of a negative stipulation in such a contract, if the negative stipulation is but a repetition in negative terms of the whole of the positive part of the contract,¹ though it is not easy to reconcile this with the decision in *Lumley v. Wagner*,² where Lord ST. LEONARDS admitted³ that the negative stipulation was "ancillary to, concurrent, and operating together with" the affirmative stipulation. It seems to be well settled, however, that the court will not grant an injunction to restrain a breach of the negative stipulation if the effect will be to compel the defendant to perform his contract of personal service or else remain idle.⁴

It appears also to be well settled that an injunction to restrain the breach of a contract for personal services will not be granted in cases where there is no express undertaking not to do an act. Thus, where the manager of a company contracted to give for a certain period "the whole of his time to the company's business," in the absence of any express stipulation not to give any of his time to a rival company, the Court of Appeal refused to grant an injunction to restrain him from so doing.⁵ And in another case of a contract of personal service the Court of Appeal held that a stipulation by the person employed to "act exclusively for the employers" does not in the absence of a negative covenant, express or implied, which is sufficiently clear and definite, enable the employers to obtain an injunction to restrain him from entering into other employment.⁶

On the other hand, in the case of contracts other than those for personal services, it has been said that the tendency of recent decisions is towards the view that the court ought to look at what is the nature of the contract

¹ *Chapman v. Westerby*, [1913] W. N. 277; 28 Digest 454, 716.

² *Supra*.

³ At p. 618. See also *Donnell v. Bennett* (1883), 22 Ch. D. 835; 28 Digest 452, 707.

⁴ *Rely-a-Bell Burglar and Fire Alarm Co., Limited v. Eisler*, [1926] Ch. 609; 43 Digest 72, 757.

⁵ *Whitwood Chemical Company v. Hardman*, [1891] 2 Ch. 416; 43 Digest 55, 564.

⁶ *Mutual Reserve Fund Life Association v. New York Life Assurance Company*, (1897), 75 L. T. 528; 43 Digest 55, 564.

between the parties, and if the contract as a whole is the subject of equitable jurisdiction then an injunction may be granted in support of the contract, whether it contain, or does not contain, a negative stipulation, but if, on the other hand, the breach of contract is properly satisfied by damages, then the court ought not to interfere, whether there be, or be not, the negative stipulation.¹

Thus the breach of an affirmative or positive term in a contract is restrainable when the contract is such as would be specifically enforced by the court, if the breach when committed would not be remedied or compensated by damages, or would involve a multiplicity of actions for the recovery of damages, unless, indeed, the granting of an injunction would cause possible damage to the defendant greater than any possible advantage to the plaintiff.² In other words, the granting or refusing of the injunction in such a case is purely a matter of discretion.

Again, an affirmative covenant may be of such a character that the court, although it cannot enforce affirmatively the performance of the covenant, will interpose to prevent that being done which would be a departure from, and a violation of, the covenant, if the injury would result from the act which it is sought to restrain, could not be adequately compensated by damages recoverable in one action.

Thus where an agreement between a racecourse company and a canal company provided that if the racecourse should at any time be proposed to be used for dock purposes the former company should give the latter the "first refusal" thereof, it was held that the canal company were entitled to enforce their rights as against the racecourse company and an intended purchaser by injunction, on the ground that the contract to give the "first refusal" involved a negative contract not to part with the racecourse to any one other than the canal company without giving them that first refusal.³ Upon this

¹ *Metropolitan Electric Supply Company v. Ginder*, [1901] 2 Ch. 799, at p. 808; 43 Digest 340, 3.

² *Doherty v. Allman* (1878), 3 A. C. 709, at p. 72; 208 Digest 364, 14.

³ *Manchester Ship Canal Company v. Manchester Racecourse Company*, [1901] 2 Ch. 37; 28 Digest 454, 718.

principle, where under contract with an electric supply company a consumer agreed to take the whole of the electric energy required for certain premises, for a period of not less than five years, at a rate specified, though there was no covenant by the company to supply, nor by the consumer to take, any energy, it was held that the contract was enforceable by injunction, it being in substance a contract not to take any electric energy from any one else.¹

The principle that the court is not inclined to enforce negatively a contract which it would not enforce positively does not apply where one party prevents the other from carrying out a contract which the court would not compel him to carry out. Thus, in *James Jones, Limited v. Earl of Tankerville*,² the plaintiffs had entered into a contract to buy, cut down and remove timber growing on the defendant's land. While they were engaged in cutting down the timber the defendant instructed his servants to prevent their continuing so to do. It was held that though the contract was one the court would not specifically enforce against the plaintiffs if they refused to carry it out, it would, nevertheless, restrain by injunction the defendant from preventing them carrying it out.

Paragraph (2).

As a general rule, where there is in a contract an express undertaking not to do a certain thing, the court will grant an injunction to prevent the doing of that thing without evidence that the plaintiff would be damaged by its being done.³ To this an exception occurs in the case of some covenants in restraint of trade. There the court will restrain a defendant from following his calling only so far as it is shown to be necessary for the protection of the plaintiff. How far it may be necessary to restrain the defendant for this purpose is a matter of fact, and under certain circumstances the court may hold that it

¹ *Metropolitan Electric Supply Company v. Ginder*, [1901] 2 Ch. 799; 43 Digest 340, 3.

² [1909] 2 Ch. 440; 39 Digest 679, 2657.

³ *Doherty v. Allman*, *supra*.

may be necessary to prevent him following a certain calling anywhere.¹

Moreover, the law's attitude to restraint of trade is based not merely on private but also on public interests, and these, too, may be taken into consideration before an injunction is granted to restrain a person from following his calling.² The present state of the law relating to covenants in restraint of trade is, however, very complicated, and a detailed discussion of it would be out of place in an elementary work.

ARTICLE 175.

As between Persons not Parties to the Contract.

Where the owner of one parcel of land covenants for value with the owner of another parcel of land not to use his land for some specified purpose, then the court will, on the application of the covenantee or his assigns, restrain not merely the covenantor, but persons purchasing his land for value with notice of the covenant for using the land for that purpose, unless the covenantee or his successors in title have by their conduct disentitled themselves from obtaining the injunction.

The doctrine here laid down is usually known as the rule in *Tulk v. Moxhay*,³ from the case in which it was first clearly enunciated. The effect of it is to create new easements unknown to the common law, that is, rights over another's land annexed to the land of the covenantee. These rights usually arise in connection

¹ *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Company*, [1894] A. C. 535; 12 Digest 241, 1973.

² *Morris (Herbert) Limited v. Saxelby*, [1915] 2 Ch. 57; 43 Digest 24, 154.

³ (1848), 2 Phil. 774; 40 Digest 313, 2667. Explained in *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386; 40 Digest 76, 590.

with the sale of the part of an estate ; but there is no reason why they should not arise between contiguous owners if the covenants under which they are given are based on valuable consideration. Thus, if the owner of Blackacre covenanted for value with the owner of Whiteacre not to do anything on Blackacre which would spoil the view from the windows of Whiteacre, the court probably would restrain a purchaser of Blackacre with notice from breaking the covenant.¹

Certain covenants as between landlord and tenant run at common law with the land, that is, they are enforceable between the landlord and his assigns and the lessee and his assigns. But on a sale in fee simple the common law regards all covenants between vendor and purchaser as to the land sold or the land retained by the vendor as merely personal covenants, and therefore not binding on the assigns of either. Equity recognises and enforces such covenants provided they are of a negative character, that is, restrain the use of, but do not compel the covenantor to do anything on, the land. The rights resulting are usually called equitable easements, since they give an equitable interest in the land which is not subject to the rule against perpetuities and is binding on a subsequent equitable purchaser of the land even when he bought without notice, on the principle that as between equitable interests the first in time is the first in right.²

Equitable easements differ from common law easements in two ways. In the first place the nature of common law easements is more or less strictly defined by law,³ while the nature and extent of negative covenants is a matter of express agreement among the parties. The only limitation upon them is that they must be negative. On the other hand, they resemble common law easements in this, that they cannot be enjoyed in gross but only in connection with the ownership of other land.⁴ In the

¹ See *Luker v. Dennis* (1877), 7 Ch. D. 227; 12 Digest 624, 5141.

² *Rogers v. Hosegood*, [1900] 2 Ch. 388; 40 Digest 312, 2664. See also Law of Property Act, 1925, sect. 2 (3); 15 Halsbury's Statutes 185.

³ See *Attorney-General Southern Nigeria v. John Holt*, [1915] A. C. 599; 19 Digest 19, 56.

⁴ See *London County Council v. Allen*, [1914] 3 K. B. 642; 40 Digest 302, 2602. See also *Miles v. Easter*, [1933] 1 Ch. 611; Digest Supp.

second place, like every other equitable interest they are liable to be defeated by the legal estate in the land being acquired by a purchaser for value without notice of their existence, whereas a common law easement, like other legal interests, is binding on the purchaser of the land subject to it whether he has notice of it or not. But, so far as concerns restrictive covenants (other than those made between lessor and lessee) entered into after 1925, notice depends on registration. Such a restrictive covenant, entered into after 1925, is registrable as a land charge in the Land Registry,¹ and if it is not so registered it is void against a purchaser of the legal estate for money or money's worth even though, on general principles, he would be deemed to have notice of it.²

It follows, therefore, that a purchaser of the legal estate for value will be bound by a restrictive covenant if he has notice of it, and the restrictive covenant may be enforced against him by the covenantee and his successors in title.³ There are also circumstances in which one purchaser or his successors in title may enforce a restrictive covenant against another purchaser or his successors in title. In the leading case of *Elliston v. Reacher*,⁴ it was laid down by PARKER, J., that restrictive covenants may be enforced by one purchaser or his successor in title against another or his successor irrespective of the dates of the respective purchases (1) if both plaintiff and defendant derive title under a common vendor; and (2) if before selling the lands now owned by plaintiff and defendant the vendor laid out his estate or a defined portion thereof (including the lands of the plaintiff and defendant) for sale in lots subject to restrictions intended to be imposed on all the lots and which, though varying in details as to particular lots, are consistent and consistent only with a general scheme of

¹ Land Charges Act, 1925, sects. 10, 13; 15 Halsbury's Statutes 531, 537.

² Law of Property Act, 1925, sects. 198, 199; 15 Halsbury's Statutes 377, 378.

³ See Law of Property Act, 1925, sects. 78, 79, 80; 15 Halsbury's Statutes 256-258.

⁴ [1908] 2 Ch. 374; [1908] 2 Ch. 665; 40 Digest 309, 2646.

development ; and (3) if those restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold—whether or not for the benefit also of the land retained by the vendor—the vendor's object in imposing the restrictions being in general to be gathered from all the circumstances, including in particular the nature of the restrictions, and it being easily inferred from the fact that a general observance of the restrictions is calculated to enhance the value of the several lots offered for sale that the vendor intended the restrictions to be for the benefit of all the lots even though he may retain other lands the value of which might be similarly enhanced ; and (4) if both plaintiff and defendant or their predecessors purchased from the common vendor on the footing that the restrictions were to enure for the benefit of the other lots included in the scheme, whether or not for the benefit of the other land retained by the vendor, this fourth point being readily inferred if the first three points be established, provided the purchasers have notice of the facts involved in them, but difficult if not impossible to establish if the purchase is made in ignorance of any material part of those facts.

If these four points be established, purchasers (and their successors in title) may enforce restrictive covenants against each other. The facts may also show an intention to bind the vendor himself, in which case the vendor himself may be restrained from using the land or permitting it to be used in a manner contrary to the restrictions.¹ It is commonly stated that when the above four points are established there is a "building scheme." The phrase is more convenient than precise. It is true that in the vast majority of cases in which the principle of the case cited is applied the land has been developed for building purposes ; but the principle would be equally applicable to other kinds of development, and the phrase used by PARKER, J., himself—namely, "general scheme of development"—seems to be a happier one. Be that

¹ *Davis v. Corporation of Leicester*, [1894] 2 Ch. 208 ; 40 Digest 307, 2632 ; *Re Birmingham District Land Co. and Allday*, [1893] 1 Ch. 344 ; 40 Digest 307, 2632.

as it may, the student should be warned against inferring the existence of such a scheme from the mere fact that identical or similar restrictions are imposed on all parts of property sold in lots. "The principle which appears to be deducible from the cases is, that where the same vendor selling to different persons plots of land, part of a larger property, exacts from each of them covenants imposing restrictions on the use of the property sold, without placing himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers."¹ Many conveyances, nowadays, are so worded as to exclude the rule in *Elliston v. Reacher*.

It should be noticed that the right to enforce a restrictive covenant may be lost by the plaintiff or his predecessors in title causing or permitting an alteration in the character of the neighbourhood or even, so it would seem, by a general change in the character of the neighbourhood irrespective of the particular acts and omissions of the plaintiff and his predecessors in title.² The change, however, must be a fundamental one. "The defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all."³

In addition section 84 of the Law of Property Act, 1925,⁴ provides a convenient method of obtaining the discharge or modification of restrictive covenants. Subsection (1) provides that an official arbitrator (called the "Authority") shall

(without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected

¹ *Per* WILLS, J., in *Nottingham Patent Brick and Tile Co. v. Butler*, 15 Q. B. D., at p. 268; 40 Digest 101, 776. See also *Ridley v. Lee*, [1935] Ch. 591; Digest Supp.

² *Sobey v. Sainsbury*, [1913] 2 Ch. 513; 40 Digest 330, 2790.

³ *Chatsworth Estates Co. v. Fewell*, [1931] 1 Ch. 224; Digest Supp.

⁴ 15 Halsbury's Statutes 260.

by the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied :—

- (a) that by reason of changes in the character of the property of the neighbourhood or other circumstances of the case which the Authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user; or
- (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or
- (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

It used to be thought that the equitable principle known as the rule in *Tulk v. Moxhay*¹ was confined to land and did not apply to restrictive conditions attaching to goods.² But the point has been unsettled since the Judicial Committee of the Privy Council held that the purchaser of a ship could be restrained by injunction from using the vessel in a manner inconsistent with the terms of a charterparty of which he had notice.³

¹ *Supra*.

² *McGruther v. Pitcher*, [1904] 2 Ch. 306; 39 Digest 526, 1407.

³ *Lord Strathcona Steamship Co. v. Dominion Coal Co.*, [1926] A. C. 108; 28 Digest 455, 724.

Not infrequently vendors enter into express covenants with purchasers not to use some of the land not included in the purchase for anything except a special object, for example not to build on the portion of the land retained as a garden in a square. Where this is the case, this restrictive covenant does not appear in the grantor's title-deeds, and accordingly a purchaser of the land retained might buy it without notice of the covenant. To prevent this it is now enacted by section 200 of the Law of Property Act, 1925,¹ that where a purchaser does not obtain the title-deeds to land held under the same title as the land purchased, he is entitled to have indorsed a memorandum of any covenants restricting the user of such lands or giving him rights over them for the purpose of giving notice to subsequent purchasers of such land.

¹ 15 Halsbury's Statutes 370.

BOOK II.
EQUITABLE REMEDIES.

**B. SECOND DIVISION OF
SUBJECT - MATTER OF
EQUITABLE REMEDIES.**

TORTS.

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BOOK II (B).

Section I. Injunctions to Restrain Wrongs.

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ARTICLE 176.

**Injunctions to Restrain Threatened,
Recurring or Continuing Torts.**

Equity will grant an ordinary or negative injunction to restrain the commission of a threatened act or the repetition or continuance of an act already committed or commenced, where it is proved to the satisfaction of the court that the defendant intends to commit or to repeat or to continue committing the act in question, and that such act if done or repeated or continued must interfere with the plaintiff's legal or equitable rights and inflict on him substantial damage.

Before the court will grant an injunction to restrain a contemplated act it must be shown to its satisfaction

that the inevitable result of the act will be a substantial interference with the plaintiff's rights.¹

The essential point to be noted is that, like other equitable remedies, the grant of an injunction is always in the discretion of the court. Consequently the court may refuse an injunction in cases where the threatened wrong can occasion no material injury to the plaintiff or the injury which it may occasion can be compensated adequately by damages.²

ARTICLE 177.

Interim, Interlocutory and Perpetual Injunctions.

Injunctions for any of the above purposes may be issued at any of three stages in an action for an injunction—

- (i) In cases of great emergency where irreparable damage may be done to the plaintiff if the defendant is permitted to proceed with his act, an injunction may be granted on the application *ex parte* of the plaintiff together with leave to serve the defendant with notice of a motion for an injunction immediately after the writ is issued.

Such injunctions are called interim injunctions, and continue in force only until the motion is heard.

- (ii) On hearing of the motion for an injunction the court, on *primâ facie* evidence

¹ See *Pattison v. Gilford* (1874), 18 Eq. 259; 28 Digest 404, 315.

² See *Behrens v. Richards*, [1905] 2 Ch. 614; 43 Digest 404, 273.

that the act of the defendant is illegal and will inflict substantial damage on the plaintiff, may grant a temporary injunction.

Such injunctions are called interlocutory injunctions, and continue in force until the trial of the action.

- (iii) At the trial of the action the court may dissolve, amend or confirm the interlocutory injunction, or where no interlocutory injunction has been granted, may grant an original injunction.

Such injunctions are called perpetual injunctions, and continue in force for ever.

- (iv) The parties to an action for an injunction may agree to treat the motion for an interlocutory injunction as the trial of the action, in which case the injunction granted by the court (if any) on the motion will be a perpetual injunction.

Paragraph (1).

Formerly injunctions were granted by the Court of Chancery to restrain proceedings in other courts. These were known as "common injunctions," as distinguished from "special injunctions" to restrain the commission or continuance of wrongful acts unconnected with judicial proceedings. Common injunctions were granted to prevent the institution, or continuance of proceedings at law, which were opposed to the principles of equity, for example, when a claim resting on a bare legal title was asserted in the Common Law Courts against a defendant who had an equitable estate or title, or when an action was brought at law upon a contract or instrument obtained by fraud or undue influence. This jurisdiction,

the exercise of which not infrequently resulted in conflict between the Court of Chancery and the Courts of Common Law, was, in effect, abolished by the Judicature Act, 1873. In modern practice, a stay of proceedings may be directed by the court before which an action is pending, upon any ground which, under the earlier practice, would have justified the Court of Chancery in granting an injunction to restrain the legal proceedings.

In any cause or matter in which an injunction has been or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury of a like kind, relating to the same property or right, and the court or a judge may grant the injunction either upon or without terms, as may be just.

An interlocutory injunction is one that is granted only up to judgment in the action in which the interlocutory order is made. An interim order is, technically, an order granted until an ensuing motion day.

In granting or refusing an interlocutory injunction, the court will not attempt finally to decide upon the legality or otherwise of the act complained of. But an interlocutory injunction will only be granted when the plaintiff has made out a *prima facie* case as to the existence of the right which he alleges and has satisfied the court that the *status quo* should be preserved until the question of whether or not the right exists has been decided.¹ The interlocutory order is by no means conclusive as to the plaintiff's right. Its object is to preserve matters *in statu quo*, so that the relief claimed, and to which a *prima facie* title has been shown, may be effective if granted at the trial.

In applying for an interim or interlocutory injunction it is necessary to prove that the threatened action of the defendant must inevitably result, if allowed to proceed, in a substantial interference with the plaintiff's rights.

¹ See *Challender v. Royle* (1887), 36 Ch. D. 425; 28 Digest 3836, 141; *Preston v. Luck* (1884), 27 Ch. D. 505; 28 Digest 457, 737.

ARTICLE 178.

Undertakings as to Damages.

(1) When granting an interim or interlocutory ordinary injunction the court always requires the plaintiff to enter into an undertaking to compensate the defendant for any damages resulting to him from the issue of the injunction should it appear on trial that there were no sufficient grounds to support the issue of the temporary injunction.

(2) In doubtful cases the court may, on the application for an interlocutory injunction, refuse to grant it on the defendant entering into an undertaking to undo the results of any act threatened, if when done the results are such as will interfere with the plaintiff's legal or equitable rights and inflict substantial damage on the plaintiff.

This undertaking by the plaintiff as to damages ought, as a rule, to be given whenever an interlocutory injunction is granted, unless such injunction is in the nature of a final order. The object is to secure to the defendant the payment of proper damages in any case where an interlocutory injunction has been granted, which, as it ultimately turns out at the trial, ought not to have been granted, or in other words to protect a defendant against the damage he may suffer by the wrongful issue of an injunction.¹ But such an undertaking is not generally required when an interlocutory injunction is granted on behalf of the Crown.²

Where an undertaking by the defendant is accepted in lieu of an interim injunction a cross-undertaking as

¹ *Smith v. Day* (1882), 21 Ch. D. 421, at p. 424; 28 Digest 518, 1236; *Fenner v. Wilson*, [1893] 2 Ch. 656; 28 Digest 519, 1248.

² *Attorney-General v. Albany Hotel Company*, [1896] 2 Ch. 696; 28 Digest 519, 1254.

to damages by the plaintiff will usually be inserted unless it is excluded by express agreement.

When it is established at the trial that the plaintiff is not entitled to an injunction, an inquiry as to the amount of damages sustained by the defendant may be directed, even though there was no misrepresentation or other default by the plaintiff in obtaining the injunction.¹

ARTICLE 179.

Mandatory or Positive Injunctions.

As a rule a mandatory injunction will be granted to remove any work interfering with the plaintiff's rights which has been carried out after an action to restrain its being carried out has been commenced or notice has been received by the defendant that if he continues carrying out the work an action will be commenced; and where the defendant knowing that a writ commencing an action for an injunction has issued avoids service of it and hurries forward the completion of the work, the court will grant a mandatory injunction for its removal without inquiring whether in fact the work interferes with the plaintiff's rights or not.

Where, however, the work was completed before complaint was made or action brought, the court will generally not grant a mandatory injunction to remove it except where the defendant is shown to have taken an unfair advantage of the plaintiff by carrying out the work in such a way as to prevent the plaintiff having an opportunity of applying in time for an

¹ *Griffith v. Blake* (1884), 27 Ch. D. 474; 28 Digest 521, 1278; *Rileys v. Mayor of Halifax* (1907), 97 L. T. 278; 28 Digest 415, 407.

ordinary injunction to restrain the defendant from carrying it out, or where it was not evident that the work would interfere with the plaintiff's rights until it was completed.

A mandatory injunction is an order which not only requires the defendant to refrain from future illegal acts, but also directs him to restore matters to the condition in which they were when the claim arose, so as to place the plaintiff in the same position as he was in before the act complained of was done.

The jurisdiction to grant a mandatory injunction is exercised with extreme caution, and only in cases where the injury, although infringing a legal right, could not be adequately compensated by damages.¹ Such an injunction as a rule will be granted before the establishment of the plaintiff's right, only where irreparable injury would otherwise result, or where the defendant continues the acts complained of after direct notice, or after proceedings have been commenced. When, for example, a defendant in an action to restrain him from building so as to infringe the plaintiff's right to light, after receiving notice of motion for an injunction, endeavoured to anticipate the action of the court by hurrying on the building complained of, an injunction was granted ordering him to pull down the building so erected.²

So also, in an action for an injunction to restrain the defendant from building so as to obstruct the plaintiff's ancient lights, where the defendant evaded service of the writ, and, after having been previously warned by the plaintiff, continued to build, an interlocutory mandatory injunction was granted, ordering the defendant to pull down so much of the building as had been erected subsequently to the warning.³

A mandatory injunction formerly took the form of an order restraining the defendant from allowing the con-

¹ See *Colls v. Home and Colonial Stores*, [1904] A. C. 179, at pp. 192, 193; 28 Digest 509, 1136; *Kine v. Jolly*, [1907] A. C. 1; 19 Digest 194, 1468.

² *Daniel v. Ferguson*, [1891] 2 Ch. 27; 28 Digest 3987, 253.

³ *Van Joel v. Hornsey*, [1895] 2 Ch. 774; 28 Digest 397, 254.

tinuance of the matter complained of, for example, "from allowing the buildings to remain on the land." The practice in this respect was altered, and an injunction which in effect requires the performance of some act, such as the demolition and removal of a building, is now to be expressed in a direct and mandatory form.¹

A mandatory injunction is not usually granted before the hearing of the action, but the court has jurisdiction to grant a mandatory injunction on an interlocutory application, and in an exceptional case it will be so granted.²

ARTICLE 180.

Damages in lieu of Injunction.

The court has jurisdiction in any application for an ordinary injunction to grant damages in lieu thereof; but it will not do so unless the damages likely to result from the refusal of the injunction are small and capable of being estimated in money.

Originally the Court of Chancery, although it could decree an account in cases where the defendant had made a profit from his wrong, had no power to award damages in an action for an injunction. In 1858, however, Lord Cairns's Act gave power to the court, in all cases in which it had jurisdiction to decree specific performance or to grant an injunction, to award damages either in addition to, or in substitution for, specific performance or an injunction. This Act has been repealed, but the jurisdiction which it conferred has been preserved by subsequent legislation.³ It has been held that under this Act damages cannot be given unless, at the time when the writ was issued, there was a case either

¹ See *Davies v. Gas Light and Coke Company*, [1909] 1 Ch. 248; 28 Digest 398, 263.

² *Collison v. Warren*, [1901] 1 Ch. 812; 28 Digest 486, 908.

³ *Leeds Industrial Co-operative Society, Limited v. Slack*, [1924] A. C. 851; 28 Digest 411, 369.

for an injunction or for specific performance.¹ On the other hand, since the Judicature Acts the court has power to award damages in any case in which, before those Acts, a court of common law could have awarded damages. Under the common law jurisdiction there is no power to award damages for a prospective or threatened injury; but it is now settled that, under the jurisdiction preserved from Lord Cairns's Act, damages may be given in lieu of an injunction for an act which is merely threatened or apprehended.²

ARTICLE 181.

Account in lieu of an Interlocutory Injunction.

On application for an interlocutory injunction in an action to restrain a breach of a monopoly the court may, in lieu of an injunction, make an order directing the defendant to keep an account of all the profits made by him through the act complained of until the hearing of the action. If, on the hearing, a perpetual injunction is granted the defendant will be ordered to pay over such profits to the plaintiff.

ARTICLE 182.

Account in lieu of Damages.

In matters coming within the concurrent jurisdiction of equity a person who has been damaged by another's wrongdoing can claim an account and also damages, but when judgment is given he is put to his election which remedy he will take.

¹ *Proctor v. Bayley* (1889), 42 Ch. D. 390; 28 Digest 410, 361; *Lavery v. Pursell* (1888), 39 Ch. D. 508, at p. 518; 12 Digest 170, 1249.

² *Leeds Industrial Co-operative Society, Limited v. Slack*, *supra*.

BOOK II (B).

Section II. Injunctions to Prevent
the Abuse of Rights.

SUMMARY.

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ARTICLE 183.

Equitable Waste.

(1) Any act or omission by a tenant for life or certain other limited owners which involves a material alteration of the inheritance, is technically termed “waste.”

(2) Waste is either “voluntary,” *e.g.*, the destruction of buildings, removal of fixtures, cutting timber, opening mines; or “permissive,” *e.g.*, allowing buildings to fall into disrepair. Voluntary waste may be restrained by injunction, but an injunction will not be granted to restrain permissive waste.

(3) A tenant for life or for any other limited interest in land, who by the terms of his grant is entitled to commit waste on the land granted, will be restrained by injunction from using his right to commit waste in an unconscionable manner so as to injure the inheritance to an unreasonable extent when it vests in the

person or persons entitled to the land on the determination of his life or other limited interest.

(4) Any person may apply for an injunction to restrain waste who has an interest in the land on which the waste is committed.

Paragraph (1).

Tenants for life, or for years, unless by the terms of the settlement they are unimpeachable for (*i.e.*, not liable for) waste, may by injunction be restrained from doing any acts amounting to waste.

Any alteration of the inheritance is at common law regarded as waste. Thus the conversion of pasture into arable land, or of wood into pasture, was waste, and as such was formerly restrained by injunction.¹ Now, however, it is established that no act will be restrained as waste which is not injurious to the inheritance, either by diminishing the value of the estate, or by increasing the burden upon the estate, or by impairing the evidence of title.² In *Doherty v. Allman*,³ the court refused to grant an injunction to restrain a lessee from converting certain store buildings, which were in disrepair, into dwelling-houses, which would increase the value of the premises. And it is now well settled that no act will be restrained by injunction as waste unless it is prejudicial to the inheritance, and what has been termed "ameliorating waste" will not be restrained.⁴

Paragraph (2).

At common law the cutting of timber, or of trees which would become timber, by a tenant for life, except periodical cutting on a timber estate, was waste. By "timber" is

¹ Coke, Lit. 53A; *Lord Darcy v. Askwith* (1617), Hob. 234; 31 Digest 350, 4930.

² *West Ham Central Charity Board v. East London Waterworks*, [1900] 1 Ch. 624, at p. 636; 31 Digest 350, 4932.

³ (1878), 3 App. Cas. 709; 31 Digest 352, 4943.

⁴ *Meux v. Cobley*, [1892] 2 Ch. 253; 31 Digest 351, 4935.

technically meant oak, ash, and elm, at least twenty years old, and such other trees as by local custom are regarded as timber.¹

Under section 66 of the Settled Land Act, 1925,² a tenant for life impeachable for waste is empowered to cut and sell timber, on the settled land, which is ripe and fit for cutting, with the consent of the trustees, or under order of the court. Three-fourths of the net proceeds of sale are to be set aside as capital money arising under the Act, and the other fourth part is to go as rents and profits.

The opening of new mines or quarries by a tenant for life amounts to waste, but where mines or quarries have already been opened and worked a tenant for life may continue working them and take the profits.³ Under the Settled Land Act, 1925, sections 41–47,⁴ a tenant for life may grant mining leases for a term not exceeding a hundred years, and is entitled if impeachable for waste to one-fourth, or, if unimpeachable, to three-fourths of the rent of such mining leases, the residue of the rent being set aside as capital money arising under the Act.

Permissive waste by a tenant for life will not be restrained by injunction, nor can a remainderman recover damages in respect of it.⁵ But section 28 (2) of the Law of Property Act, 1925,⁶ provides that, where land is subject to a trust for sale, the trustees may pay the cost of repairs out of income, unless the trust instrument otherwise directs. This provision extends even to substantial structural repairs.⁷ If, however, the trustees seek the direction of the court, the court has power to throw the cost on capital or to apportion it between capital and income.⁸

¹ *Dashwood v. Magniac*, [1891] 3 Ch. 306; 34 Digest 627, 233.

² 17 Halsbury's Statutes 899.

³ *Elias v. Snowdon Slate Quarries Company* (1879), 4 App. Cas. 454; 34 Digest 632, 291; *Greville-Nugent v. Mackenzie*, [1900] A. C. 83; 34 Digest 611, 92.

⁴ 17 Halsbury's Statutes 880–885.

⁵ *In re Parry and Hopkin*, [1900] 1 Ch. 160; 40 Digest 650, 1895.

⁶ 25 Halsbury's Statutes 204.

⁷ *Re Gray*, [1927] 1 Ch. 242; 40 Digest 648, 1872.

⁸ *Re Robins*, [1928] Ch. 721; Digest Supp.

Paragraph (3).

A tenant for life "without impeachment of waste" would, notwithstanding his wide powers, be restrained in equity from the commission of certain acts of waste, upon the principle that such acts would constitute an unfair and unconscientious use of his powers. For instance, a tenant for life unimpeachable for waste might, quite apart from the modern statutory powers, legally cut and sell timber. But he would not be allowed, without special reason, to cut down ornamental trees or timber, and any such attempt to exercise his legal powers would be restrained as "equitable waste." In *Vane v. Lord Barnard*,¹ the tenant for life, though not impeachable for waste, was, upon the ground that he was using his legal powers unfairly, restrained from taking off the roof of Raby Castle in order to spite the remainderman. A tenant for life may, however, cut timber and retain the proceeds, when, though ornamental, it is injurious to adjoining trees.²

Section 135 of the Law of Property Act, 1925,³ enacts that an estate for life without impeachment of waste does not confer upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appear by the instrument creating such estate.

Paragraph (4).

Any person whose estate or interest would be prejudiced by the waste which it is sought to restrain is entitled to an injunction. Any reversioner or remainderman, whether the owner of the inheritance or merely entitled to a life estate, may sue to restrain waste. An injunction might be granted at the instance of trustees to preserve contingent remainders to prevent waste by a tenant for life and a remote remainderman in collusion.⁴ And a private

¹ (1716), 2 Vern. 738.

² *Baker v. Sebright* (1879), 13 Ch. D. 179; 2 Digest 109, 918.

³ 15 Halsbury's Statutes 313.

⁴ *Garth v. Cotton* (1753), 3 Atk. 751; 2 Digest 89, 701.

individual may apply for an injunction to restrain the pollution by local authorities of a river passing through his land, even though these have a statutory right to discharge sewage from their sewers.¹

In all cases of actions for the prevention of waste, one person may sue on behalf of himself and all persons having the same interest.²

ARTICLE 184.

Confidential and Private Information.

Where one person obtains while in the service of another confidential information as to the business in which he is employed or where one person obtains information from another on the implied understanding that he is to use such information only for his own instruction, equity will, by injunction, restrain such person from communicating such information to others in a way that may be detrimental to the person from whom the information was obtained.

Formerly it was on the ground of breach of confidence that the publication or other improper use of private letters was restrained on application of the writer or his personal representatives.³ Now, however, since copyright is given to unpublished literary work, and such copyright cannot be transferred except by written assignment, it is no longer necessary to rely on this ground. The publication may be restrained as an infringement of copyright.

¹ *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; 36 Digest 190, 320.

² Order 16, rule 37.

³ *Pope v. Curl* (1741), 2 Atk. 341; 13 Digest 200, 355; *Earl of Lytton v. Devey and Swan, Sonnenschein and Company* (1884), 52 L. T. 121; 13 Digest 200, 358.

The old rule, however, as to breach of confidence has still many applications outside the Copyright Act. Thus, the publication of lectures delivered by a University professor to students in his class-room has been restrained upon the ground that such delivery of the lectures was not equivalent to a communication of them to the public, and that the lecturer was entitled to restrain their unauthorised publication.¹

Publication of information obtained under circumstances of confidence, as where persons in the course of employment obtain information, or where information is acquired under an express or implied promise not to divulge or make use of it, will be restrained.² Thus, where a person apprenticed to, and in the employment of, a firm of engine-makers acquired certain trade secrets, and, without their consent, in breach of confidence, compiled a table of dimensions of various types of engines, the employers were granted an injunction restraining him from publishing or communicating the table or its contents to any one.³

Moreover, in these cases an injunction may be obtained to restrain a third party from inducing, or attempting to induce, the disclosure of information in breach of confidence. Thus where the defendant's manager attempted by bribery to induce employees of the plaintiff to disclose information which they had no right to disclose, and the results of such disclosure (if it had been made) would have caused irreparable damage to the plaintiffs, an injunction was granted despite the fact that the attempted bribery was unsuccessful.⁴

¹ *Caird v. Sime* (1887), 12 App. Cas. 326; 13 Digest 173, 95.

² *Lamb v. Evans*, [1893] 1 Ch. 218; 13 Digest 171, 80.

³ *Merryweather v. Moore*, [1892] 2 Ch. 518; 28 Digest 478, 837. See also *Robb v. Green*, [1895] 2 Q. B. 315; 28 Digest 477, 829; *Kirchner and Company v. Gruban*, [1909] 1 Ch. 413, at p. 422; 28 Digest 454, 715; *Exchange Telegraph Company v. Central News*, [1897] 2 Ch. 48; 13 Digest 179, 148.

⁴ *Schophony, Ltd. v. Traub*, [1937] 4 All E. R. 279; Digest Supp. See also *Exchange Telegraph Company v. Gregory and Company*, [1896] 1 Q. B. 147; 13 Digest 179, 147.

ARTICLE 185.

Passing Off.

Where one person has acquired by long usage in the open market a special name or description for his business or his goods, equity will grant an injunction to restrain a second person from using a name or description for his business or his goods so similar to that of the acquired name or description of the business or the goods of the first person as to lead the public to believe that they are dealing with him or buying his goods when in fact they are dealing with the second person or buying his goods.

Apart altogether from any question of infringement of a registered trade mark, an action will lie for an injunction to restrain a trader from "passing off" his goods as those of another. In order to obtain an injunction in this class of cases there must either be evidence of a fraudulent intent to deceive, or alternatively evidence that the conduct of the defendant (*e.g.*, owing to similarity of the "get-up" of the goods, resemblance of the symbols, marks, or names, etc.) is such as to be calculated to deceive buyers.¹

A trader will be restrained from passing off his goods as the goods of another trader by selling them under a name which is likely to deceive immediate or ultimate purchasers into the belief that they are buying the goods of that other trader. Upon this principle, in *Reddaway v. Banham*,² where the plaintiff had for some years made

¹ *Singer Manufacturing Company v. Loog* (1880), 18 Ch. D. 395, at p. 412; 8 App. Cas. 15; 43 Digest 225, 686; *Reddaway v. Banham*, [1896] A. C. 199; 43 Digest 277, 1098; *Payton and Company v. Snelling, Lampard and Company*, [1901] A. C. 308; 43 Digest 308, 1310.

² *Supra*. See also *The Birmingham Vinegar Brewery Company v. Powell*, [1897] A. C. 710; 43 Digest 274, 1076; *Singer Manufacturing Company v. British Empire Manufacturing Company* (1903), 20 R. P. C. 313; 43 Digest 300, 1247; *Rey v. Le Conturier*, [1908] 2 Ch. 715; 43 Digest 273, 1074; *Clock, Limited v. Clock House Hotel, Limited* (1935), 53 R. P. C. 269; Digest Supp.; *Sturtevant Engineering Company, Limited v. Sturtevant Mill Company of U.S.A., Limited*, [1936] 3 All E. R. 137; Digest Supp.

and sold goods as "Camel Hair Belting," which name in the trade designated the plaintiff's goods only, he was held to be entitled to an injunction restraining the defendant from using the words "camel hair" as descriptive of belting sold by him, and manufactured by persons other than the plaintiff, without clearly distinguishing such belting from the belting of the plaintiff.

An intention to deceive may be inferred from the circumstances of the case, and an injunction granted although there is no proof of any actual case of deception, if there be a probability of deception.¹ On the other hand, if the probability of deception be not established, as where the get-up of the goods is not calculated to deceive or the two businesses are distinct in character,² an injunction will not be granted. Moreover, where the descriptive word, the use of which is complained of by the plaintiff, is not proved to have acquired a secondary meaning so as to denote only the goods of the plaintiff's manufacture, the plaintiff will not be entitled to an injunction.³ Nor will an injunction be granted in the case of one instance only of passing off being proved when there is no proof of fraudulent intent, or of intention to repeat the act, or of damage to the plaintiff.⁴

The use of a trade name or designation applied to a business or to goods which is as a matter of fact reasonably calculated to deceive, is restrainable by injunction. Upon this principle, where a long-established brewery company had carried on business under the name of "The Manchester Brewery Company, Limited," and a new com-

¹ *County Chemical Company v. Frankenburg* (1904), 21 R. P. C. 722; 43 Digest 310, 1333; *Bourne v. Swan and Edgar, Limited*, [1903] 1 Ch. 211, at p. 225; 43 Digest 307, 1299.

² *Hall of Arts and Sciences Corporation v. Hall* (1934), 50 T. L. R. 518; Digest Supp.

³ *Hommel v. Bauer and Company* (1905), 22 R. P. C. 43; 43 Digest 279, 1105; *Electromobile Company v. British Electromobile Company, Limited* (1908), 25 R. P. C. 149; 43 Digest 288, 1164.

⁴ *John Knight and Sons v. Crisp and Company* (1904), 21 R. P. C. 670; 43 Digest 331, 1522.

pany, without any intention to deceive, was incorporated and registered as "The North Cheshire and Manchester Brewery Company, Limited," the latter company, upon evidence that as a matter of fact the use of that name was calculated to deceive, were restrained by injunction "from using the name, style, or title of the North Cheshire and Manchester Brewery Company, Limited, or any other style or name which includes the plaintiff company's name, or so nearly resembles the same as to be calculated to induce the belief that the business carried on by the defendant company is the same as the business carried on by the plaintiff company, or in any way connected therewith."¹

And a trader may be restrained even from using his own name, where it is such that it has become so identified with the business or goods of another as to be deceptive when used without qualification. In this respect the use of a name is on the same footing as the use of any other descriptive word. For example, Messrs. J. and J. Cash having for many years made and sold at Coventry goods known as "Cash's Frillings," etc., one Joseph Cash was restrained from carrying on in the same town the business of a manufacturer or seller of frillings, etc., under the name of "Joseph Cash and Company," or under the name of "Cash," or under any name so as to mislead.² But in these cases a trader will not be restrained altogether from carrying on business in his own name, but only from using his name in such a way as is calculated to deceive; and a man is entitled usually to trade under his own name, provided that he does so honestly and does not attempt to pass off his goods as those of another.³

¹ *North Cheshire and Manchester Brewery Company v. Manchester Brewery Company*, [1899] A. C. 83; 9 Digest 65, 200.

² *J. and J. Cash, Limited v. Cash* (1902), 19 R. P. C. 181; 43 Digest 267, 1039. See also *Valentine Meat Juice Company v. Valentine Extract Company* (1900), 17 R. P. C. 673; 43 Digest 267, 1038; *Fine Cotton Spinners Association and John Cash and Sons v. Harwood Cash and Company*, [1907] 2 Ch. 184; 43 Digest 265, 1027.

³ *Burgess v. Burgess* (1853), 3 De G. M. & G. 896; 43 Digest 286, 1155.

And in all cases where there is no proof of any actual deception, or probability of deception, an injunction will not be granted. Thus in *Macmillan v. Ehrmann Brothers*,¹ the court refused to restrain the use of a name which was not the name of the plaintiff or of the defendants, there being no proof of probable deception, or that the conduct of the defendants had intercepted or was likely to intercept the plaintiff's trade.

In this connection it should be noted that a name or mark may often acquire added protection by virtue of registration under the Trade Marks Act, 1938.² The remedy which has been described in the foregoing paragraphs depends upon the principle that one trader is not allowed to pass off his goods as being those of another. Under the Act of 1938, however (as under the previous Acts), a register of trade marks is established, and registration therein confers a right of property in the mark so registered. A "passing-off" action is still possible, but for the protection of a registered trade mark the Act provides alternative and better remedies.

For the purposes of the Act a trade mark is defined as a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person. It follows from this definition that many marks may be registered as trade marks which could not be protected by a "passing-off" action; and this becomes more apparent when we consider the various kinds of marks which are registrable. The register is divided into two parts, Part A and Part B. In order for a trade mark to be registrable in Part A of the register it must contain

¹ (1904), 21 R. P. C. 647; 43 Digest 137, 13. See also *Dunlop Pneumatic Tyre Company v. Dunlop Motor Company*, [1907] A. C. 430; 43 Digest 282, 1126.

² 31 Halsbury's Statutes 753.

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¹ (1904), 21 R. P. C. 647; 43 Digest 137, 13. See also *Dunlop Pneumatic Tyre Company v. Dunlop Motor Company*, [1907] A. C. 430; 43 Digest 282, 1126.

² 31 Halsbury's Statutes 753.

or consist of at least one of the following essential particulars :—

- (1) The name of a company, individual, or firm represented in a special or particular manner ;
- (2) the signature of the applicant for registration, or of some predecessor in business ;
- (3) an invented word or invented words ;
- (4) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname ;
- (5) any other distinctive mark.

In addition a trade mark which has been registered in Part A for seven years cannot be removed from the register on the ground that it was not originally entitled to registration. In Part B any mark may be registered if it is capable, in relation to the goods in respect of which it is registered or proposed to be registered, of distinguishing goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists.

Registration in either part of the register gives to the registered proprietor the exclusive right to use the mark upon or in connection with the goods in respect of which it is registered. In any action for the infringement of a trade mark registered in Part B, however, no injunction or other relief will be granted to the plaintiff if the defendant can prove that the use of which the plaintiff complains is not likely to deceive or cause confusion or so be taken as indicating a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the trade mark. Even in the case of a mark registered in Part A no damages or account of profits will be ordered against a person who innocently infringes the mark unless he has continued the infringement after notice of the plaintiff's rights ; but an injunction may be granted nevertheless.

One important respect in which an action for the

infringement of a trade mark is more convenient than a "passing-off" action lies in the fact that it is not necessary for the plaintiff to prove his right to the trade mark; registration in either part of the register is *prima facie* evidence of such right, and registration in Part A is usually conclusive evidence of it after seven years.

ARTICLE 186.

Threatened Proceedings against a Patentee.

In an action to restrain the continuance of threats of legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of an invention, by a person claiming to be a patentee of such invention, an injunction may be granted to restrain the continuance of such threats, unless such person with due diligence commences and prosecutes an action for infringement of his patent.

The remedy in the case of groundless threats of legal proceedings concerning the user of a patent is by injunction. Section 36 of the Patents and Designs Act, 1907, enacts that "where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings, or liability, in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence

commences and prosecutes an action for infringement of his patent.”¹

A letter to a third party threatening litigation has been held to be a threat within the meaning of this section, which entitled the patentee to an injunction.² It has been held that threats of legal proceedings for infringement of patent rights are none the less “threats” within the meaning of the enactment because made in answer to the infringer or to a third person.³

¹ See *Craig v. Dowding* (1908), 98 L. T. 231; 36 Digest 848, 3345.

² *Douglas v. Pintsch's Patent Lighting Company*, [1897] 1 Ch. 176; 43 Digest 845, 3327.

³ *Skinner and Company v. Shew and Company*, [1893] 1 Ch. 413; 43 Digest 348, 3343.

BOOK II.
EQUITABLE REMEDIES.

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ARTICLE 187.

Purposes for which Accounts are Issued.

The court has jurisdiction to order accounts to be taken in cases of equitable claims or in aid of legal rights; and in particular, this jurisdiction is frequently exercised in cases of trusts, mortgages, partnership, and administration of estates.

The taking of accounts formed an important branch of the jurisdiction of the Court of Chancery. In the Common Law Courts no adequate machinery existed for the taking of accounts; matters of account were usually referred to arbitration, and in the old action of account at law the account was taken by auditors, which lengthened the litigation and deterred litigants.¹ On the other hand, in the Court of Chancery the taking of accounts was formerly referred to Masters in Chancery, and was a regular part of the jurisdiction. In matters based upon purely equitable claims, such as trusts, redemption of mortgages,

¹ See *Ex parte Bax* (1751), 2 Ves. Sen. 388.

or equitable waste, an order for the taking of an account was a species of equitable relief necessarily incidental to the jurisdiction. Moreover, the Court of Chancery exercised a concurrent jurisdiction with the Courts of Law in matters of account in aid of legal claims.

The law as to accounts and receivers specifically relating to the two subjects which are most important in an elementary treatise on equity—trusts and mortgages—have already been dealt with. What follows is merely a statement of the general principles affecting these two remedies independently of the subject-matter to which they relate.

Cases in which accounts are ordered in aid of legal rights.—Shortly, it may be stated that accounts will be ordered in aid of legal rights (1) where there are “mutual accounts” between the parties, *i.e.*, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other’s account¹; (2) where the accounts are of so complicated a nature as to be incapable of proper adjustment in an action at law²; (3) where a fiduciary relation exists between the parties as in cases of executorship, administration, partnership, and as between principal and agent or principal and factor, but not as between banker and customer which does not involve relation of a fiduciary character³; (4) in cases of fraud in which the plaintiff has been prevented from enforcing a legal right by the conduct of the defendant⁴; (5) as ancillary to injunctions for the protection of legal rights, as in cases of infringement of copyright, patents, trade marks, etc., in which, as we have seen, accounts of the profits accruing from the illegal acts are frequently ordered.

Accounts based on equitable and legal claims distinguished.—The distinction between the cases of accounts arising out of equitable claims (*e.g.*, in trusts, redemption,

¹ *Phillips v. Phillips* (1852), 9 Hare 471, at p. 473; 20 Digest 267, 276.

² *Taff Vale Railway Company v. Nixon* (1847), 1 H. L. C. 111; 20 Digest 267, 278.

³ *Foley v. Hill* (1848), 2 H. L. C. 28; 20 Digest 268, 280.

⁴ *McIntosh v. Great Western Railway* (1850), 2 Mac. & G. 74; 7 Digest 362, 119.

or equitable waste) and accounts arising out of legal claims is still of practical importance. In particular, the right to an account based upon an equitable claim may be barred by *laches* or acquiescence on the part of the defendant; in the case of a legal claim the right to an account is barred only by such lapse of time as would have barred the legal remedy.¹

This difference in the rules applicable to accounts arising out of equitable and legal claims is attributable to the principle that in dealing with legal claims the Court of Chancery followed the rules of law, whereas in purely equitable claims the court granted such relief as the nature of the case demanded in order to secure complete justice and avoid multiplicity of litigation.

Four classes of cases in which, prior to the Judicature Acts, a suit for an account could have been maintained in equity have been judicially pointed out.²

(1) Where the plaintiff had a legal right to have money payable to him ascertained and paid, but, owing to defective legal machinery, he could not practically enforce his right at law. Suits for an account between principal and agent, and between partners, are familiar instances of this class of case.

(2) Where the plaintiff would have had a legal right to have money ascertained and paid to him by the defendant if the defendant had not wrongfully prevented such right from accruing to the plaintiff. In such a case a court of law could only give unliquidated damages for the defendant's wrongful act, and there was often no machinery for satisfactorily ascertaining what would have been due and payable if the defendant had acted properly. A Court of Equity, however, in such a case decreed an account, ascertained what would have been payable if the defendant had acted as he ought to have done, and ordered him to pay the amount.³

¹ But see *In re Richardson*, [1919] 2 Ch. 50; affirmed, [1920] Ch. 423; 24 Digest 672, 6990.

² See *London, Chatham and Dover Railway Company v. South Eastern Railway Company*, [1892] 1 Ch. 120, at p. 140, per LINDLEY, L.J.; 20 Digest 249, 133.

³ *McIntosh v. Great Western Railway Company* (1850), 2 Mac. & G. 74; 7 Digest 362, 119.

(3) Where the plaintiff had no legal but only equitable rights against the defendant, and where an account was necessary to give effect to those equitable rights. Ordinary suits by *cestuis que trust* against their trustees and suits for equitable waste fell within this class.

(4) Combination of the above cases. The jurisdiction in equity in suits for accounts was based, therefore, either upon the absence of any legal remedy or the incompleteness of the remedy by action at law.

Actions for Accounts.—All causes for the purpose of taking partnership or other accounts were expressly assigned to the Chancery Division by section 34 (3) of the Judicature Act, 1873.¹ Since this enactment, therefore, there being no suitable machinery for the taking of lengthy or complicated accounts in the King's Bench Division, otherwise than by reference to a special or official referee, all actions involving such accounts, which previously would have been maintainable in Chancery, should be commenced by writ in the Chancery Division.² An action for an account in the Chancery Division is an action for the balance found to be due after taking the account.³ But cases not involving the taking of an account, in which an action at law would have been the proper remedy, as for instance actions for debt or a balance due, or for liquidated damages, or mere cases of set-off or cross-demands, may be assigned to any division of the High Court, including the Chancery Division.

ARTICLE 188.

Ordering Accounts.

(1) In the absence of fraud the court will order an account *ab initio* only where the party

¹ Now re-enacted by the Judicature Act, 1925, sect. 56 (13 Halsbury's Statutes 219).

² *Leslie v. Clifford* (1884), 50 L. T. 590; 20 Digest 266, 269.

³ *Manners v. Pearson and Son*, [1898] 1 Ch. 581; 20 Digest 267, 274.

bound to account has delivered no account or has delivered an account which the other party has not either expressly or by acquiescence accepted. In such cases the matter is said to be one of an *open account*.

(2) Where an account has been delivered by the party bound to account and it has been accepted expressly or by acquiescence the matter is said to be one of an *account stated*, and when the other party has accepted payment of the balance shown to be due on the account delivered by the party bound to account the matter is said to be one of an *account settled*.

(3) When an account is open the court has a free hand as to how far it should be re-taken by the master. When it is stated or settled the court will not order a new account to be taken except where fraud is proved (this is called *re-opening the account*); but on proof of serious errors on the part of the accounting party will order that the other party shall have liberty to prove that certain items contained in the account rendered should be deleted or that certain items not contained in the account should be so contained therein and charged against the accounting party. This is called *surcharging and falsifying*.

Stated and settled accounts are to be distinguished from open accounts. An account stated or settled is regarded as an account impliedly or expressly agreed between the parties. Whether an account is a settled account depends on the circumstances of the particular case, and the mode of dealing of the parties, but generally when there is evidence that the parties have treated an account as settled the court will regard it as a settled account. So an account which has been delivered by one

party to the other, who does not raise any objection to it within a reasonable time, is a settled account.¹

The fact that there has been a stated or settled account as a rule constitutes a defence to a claim for an account. The order in an action for an account usually directs that settled accounts are not to be disturbed, and gives leave to "surcharge and falsify." And even though these directions are not contained in the order for an account, the accounting party is entitled to set up settled accounts.² In an action for an account the plaintiff may "surcharge," that is, prove that an item has been omitted from the defendant's account, for which credit ought to have been given, or "falsify," that is, prove that an item has been erroneously or fraudulently inserted in the account.

In the absence of fraud a settled account will not generally be allowed to be reopened. Thus, if a settled account be impeached, and a single important error be established, the court will not order the whole account to be reopened, except in the case of fraud, but will merely give the plaintiff liberty to surcharge and falsify.³ On the other hand, on proof of fraud a settled account may be reopened. So accounts containing errors considerable in number and amount, whether caused by fraud or even mistake, may be ordered to be reopened.⁴

ARTICLE 189.

Wilful Default.

An account is generally limited to items which have been actually received or paid by the party directed to account, but an account may,

¹ *Willis v. Jernegan* (1741), 2 Atk. 251.

² *Holgate v. Shutt* (1884), 28 Ch. D. 111; 7 Digest 500, 281.

³ *Gething v. Keighley* (1878), 9 Ch. D. 547; 20 Digest 276, 350.

⁴ *Williamson v. Barbour* (1877), 9 Ch. D. 529; 20 Digest 273, 329.

As to the reopening of a closed account in a money-lending transaction under the Moneylenders Act, 1900, see *Saunders v. Newbold*, [1905] 1 Ch. 260; 35 Digest 212, 377.

in a proper case, be ordered to be taken on the footing of wilful default, that is to say, that the accounting party may in addition be required to account for such moneys as would have been received but for his wilful neglect or default.

An administrator, executor, or trustee, may, for instance, where the circumstances so justify, be charged with wilful neglect or default in not getting in moneys due whereby assets are lost to the estate. It is to be observed that such neglect or default may be wilful even though it may have been quite unintentional and have arisen from mere forgetfulness.¹

When it is sought to charge an executor, or trustee, or other accounting party, with loss attributable to his wilful default or breach of duty, there must be some *primâ facie* evidence of such breach of duty before any declaration of liability, or even an inquiry as to liability, based upon such supposed breach of duty, will be inserted in the judgment.² The omission of executors or trustees to press for payment of trust funds or, if not paid within a reasonable time, to enforce payment by prompt legal proceedings, would usually amount to such a breach of duty.³ This principle, however, is subject to statutory modifications. Thus by section 15 of the Trustee Act, 1925,⁴ personal representatives and trustees may (*inter alia*) accept any composition or any security for any debt or for any property claimed ; or allow any time for payment of any debt ; or compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to the estate or to the trust. By section 22 of the same Act,⁵ where trust property includes any share or interest in property not vested in the trustees, or the proceeds of sale of any such property, or any other thing in action, the trustees, on the same falling into possession or becoming payable

¹ *Elliott v. Turner* (1843), 13 Sim. 477 ; 36 Digest 9, 13.

² *In re Stevens*, [1898] 1 Ch. 162 ; 24 Digest 660, 6864.

³ *In re Brogden* (1888), 38 Ch. D. 546 ; 23 Digest 322, 3889.

⁴ 20 Halsbury's Statutes 108.

⁵ 20 Halsbury's Statutes 112.

or transferable, may (a) agree or ascertain the amount or value thereof or any part thereof in such manner as they may think fit ; (b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which they may think fit, any authorised investments ; (c) allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable ; (d) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release ; without (in any of these cases) being responsible for any loss occasioned by any act or thing done by them in good faith. Moreover, the same section ¹ provides that trustees shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission to take proceedings on account of any act, default, or neglect on the part of the persons in whom such securities or other property are for the time being, or had at any time been, vested ; unless required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to their satisfaction for payment of the costs of any proceedings required to be taken. This provision, however, is subject to the proviso that it shall not relieve the trustees of the obligation to get in trust property on the same falling into possession ; and all these, and other, statutory provisions should be read in conjunction with the paramount duty of trustees to exercise reasonable care and to act as reasonable business men would act.

¹ 20 Halsbury's Statutes 112.

ARTICLE 190.

Receivers and Managers.

A receiver may be appointed as receiver and manager to carry on a business, but unless expressly appointed as manager a receiver as such has no powers of management.

A receiver is, for present purposes, an individual, frequently an accountant, sometimes the liquidator of a company, appointed by the court for the benefit of all the creditors in certain cases, especially in actions by debenture-holders or mortgagees.¹

The chief duties of a receiver are to take possession of the estate or property, and to collect and to receive the rents or profits of land or the income of any property or of a business or undertaking, and generally to get in outstanding assets, and also, if the order appointing him so directs, to pay or discharge ascertained debts or liabilities and take proper receipts therefor.

A receiver appointed by the court is a person in a fiduciary relation, and will not, therefore, be allowed to buy any property of which he is receiver unless he obtain the leave of the court.²

The person appointed receiver is regarded as an officer of the court as from the date of his appointment. His possession is the possession of the court, and any interference by any third party with such possession will be restrained by injunction and involves liability to committal for contempt of court.³ Any party, therefore, who claims a right or title paramount to that of the party who has obtained the appointment of a receiver ought to make an application to the court before taking legal proceedings affecting the possession for leave to do so, notwithstanding the possession of the receiver.⁴

¹ As to the appointment of receivers by mortgagees by deed, see *supra*, Article 128.

² *Nugent v. Nugent*, [1908] 1 Ch. 546; 39 Digest 67, 776.

³ *Dixon v. Dixon*, [1904] 1 Ch. 161; 36 Digest 490, 1550.

⁴ *Ex parte Cochrane* (1875), L. R. 20 Eq. 282; 39 Digest 48, 586.

A receiver is entitled to be indemnified out of the estate against all loss incurred in the proper discharge of his duty,¹ and he is entitled to priority in respect of his costs, charges, and expenses properly incurred.² Before defending an action, however, he must obtain the sanction of the court, otherwise he will not be entitled to an indemnity in respect of costs so incurred.³ So, also, he should as a rule obtain the leave of the court before borrowing money or incurring liabilities for the purposes of a business.⁴

When a receiver is appointed, as is often the case, for the assets of a business which it is intended to wind up, he has, as receiver, no power whatever to carry on or manage the business. In such a case his functions are merely to receive rents and profits and get in debts, and the actual business itself must cease on his appointment. The court, however, may, in its direction, appoint a person to be not only receiver, but also manager, of a business which is a going concern. In practice a receiver and manager is frequently appointed to a business, whether carried on by an individual, a partnership, or a company, in order to preserve the assets and goodwill, wind up the business or undertaking, and sell it as a going concern.⁵ When such an appointment is made, the receiver and manager has power to carry into effect existing contracts, and enter into new contracts, such as contracts for sale and purchase, which may be necessary for the general conduct of the business in the way in which it is usually carried on. On the other hand, he has no power to speculate with the business.⁶

The court appoints a manager of a business, as distinguished from a mere receiver, only with a view to a sale or realisation, for the court will not assume the

¹ *Davy v. Scarth*, [1906] 1 Ch. 55; 36 Digest 489, 1538.

² *In re Glasdir Copper Mines*, [1906] 1 Ch. 365; 10 Digest 800, 5070.

³ *In re Dunn*, [1904] 1 Ch. 648; 39 Digest 82, 960.

⁴ *In re British Power, etc., Company*, [1907] 1 Ch. 528; 39 Digest 94, 1116.

⁵ *In re Joshua Stubbs*, [1891] 1 Ch. 475; 10 Digest 794, 5004.

⁶ *Taylor v. Neate* (1888), 39 Ch. D. 538.

permanent management of a business or undertaking.¹ Hence if a mortgagee obtains the appointment of a receiver over property on which the mortgagor carries on business, the receiver will not be appointed as manager of the business unless the business or goodwill is expressly or by implication charged or included in the security.²

In a debenture-holder's action—that is, an action by debenture-holders of a company to enforce their security—a person may be appointed not only receiver of the property of the company, but also manager of its business and undertaking, for a limited period, when the security is in jeopardy owing to the insolvency of the company, even though the security has not “crystallised” by the debenture debt having become actually due.³

The court, however, will not, as a rule, appoint a manager, as distinguished from a receiver, in the case of a company incorporated with statutory powers for the purpose of carrying on a business or undertaking of a public character or for public purposes, such as a tramway or waterworks company.⁴

ARTICLE 191.

Jurisdiction to Appoint Receiver.

The court has a discretionary power to make an order for the appointment of a receiver in all cases in which it appears to the court to be just or convenient that such an order should be made.

¹ *Gardner v. London, Chatham and Dover Railway Company* (1867), L. R. 2 Ch. 201, at p. 212; 39 Digest 93, 1103.

² *Whitley v. Challis*, [1892] 1 Ch. 64; 35 Digest 253, 119.

³ *In re London Pressed Hinge Company*, [1905] 1 Ch. 576; 10 Digest 761, 4763.

⁴ *Marshall v. South Staffordshire Tramways Company*, [1895] 2 Ch. 36; 10 Digest 1191, 8450. But a judgment creditor, under the Railway Companies Act, 1867, section 4, was held to be entitled to obtain, if necessary, the appointment of a manager; *In re Liskeard and Caradon Railway Company*, [1903] 2 Ch. 681; 38 Digest 382, 793.

The jurisdiction to appoint a receiver is regulated by section 45 of the Judicature Act, 1925,¹ which provides that a receiver may be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just.

The words of the statute are enabling and not obligatory. Hence the appointment of a receiver is a matter of discretion in each case, and cannot be claimed as of right. So, though a receiver *may* be appointed at the instance of a legal mortgagee, he has no absolute right to a receiver, and if he has once taken possession of the mortgaged property, and assumed the consequent responsibilities, the court will not appoint a receiver to enable him to relinquish the position and liabilities of a mortgagee in possession.²

In the same way, the appointment of a receiver at the instance of an equitable incumbrancer with a view to the protection of the security, though nothing may be immediately payable, is also a matter of discretion. Thus, the holder of a debenture creating a floating charge upon the property of a company may, when the security is in jeopardy, obtain the appointment of a receiver though there has been no default in payment.³ In such a case the real question to be considered is whether, as between the company and the debenture-holder, it is just and convenient that the company's authority to dispose of its assets in the ordinary course of business should be stopped, and it is reasonable, as between those parties, that the authority should be stopped if its continuance would injure the debenture-holder. A legal mortgagee may take possession simply because he chooses, and in so doing accepts the responsibility of a mortgagee in possession. But an equitable mortgagee must show

¹ 13 Halsbury's Statutes 214; re-enacting section 25 (8) of the Judicature Act, 1873.

² *In re Prytherch* (1889), 42 Ch. D. 590; 39 Digest 13, 96.

³ *In re London Pressed Hinge Company*, [1905] 1 Ch. 576; 10 Digest 761, 4763.

good reason why the court should at his instance take possession by its receiver, and danger to the security by anticipated acts of an execution creditor is good reason.¹

Section 25 of the Judicature Act, 1873, which is now re-enacted in section 45 of the Act of 1925, enabling the court to appoint a receiver whenever just and convenient, enlarged the power of the court by enabling it to appoint receivers in cases in which before the Act it used not to do so.² The principles upon which the jurisdiction of the Court of Chancery to appoint receivers was based have not, however, been altered by the Act. The court, therefore, will not appoint a receiver by way of equitable execution in any case in which before the Act it would not have had jurisdiction to do so. "We cannot," said CHITTY, L.J., "judicially hold the appointment of a receiver in a case in which no court could grant a receiver before the Act to be 'just or convenient,' within the true meaning of the Judicature Act, 1873, section 25 (8)."³ It follows that there is no jurisdiction to appoint a receiver at the instance of a judgment creditor by way of equitable execution in any case in which prior to the Act no court would have had jurisdiction, merely because the appointment of a receiver would be of more convenience in the particular circumstances than the ordinary modes of legal execution.⁴

The court has jurisdiction to appoint a receiver of property situate out of the jurisdiction.⁵

¹ *In re London Pressed Hinge Company*, *supra*.

² *Cummings v. Perkins*, [1899] 1 Ch. 16, at p. 20, *per* LINDLEY, M.R.; 39 Digest 7, 13.

³ *Holmes v. Millage*, [1893] 1 Q. B. 551, at p. 558; 21 Digest 666, 2460.

⁴ *Harris v. Beauchamp Brothers*, [1894] 1 Q. B. 801; 21 Digest 665, 2451.

⁵ *In re Maudslay, Sons and Field*, [1900] 1 Ch. 602; 21 Digest 673, 2526.

ARTICLE 192.

Objects of Appointment.

A receiver is in general appointed—

- (1) With a view to the protection of the property, and especially with the view of preserving property pending the decision of litigation regarding it; or
- (2) By way of equitable execution where legal execution is in the circumstances not available or is difficult of attainment.

Paragraph (1).

The court has a discretionary jurisdiction to appoint receivers for the protection of property from the improper acts of persons who have the legal, but no, or only partial, beneficial interests therein. Where, for example, the estate of an infant is likely to be seriously prejudiced by the acts of the infant's guardian or parent a receiver may be appointed.¹

Property in the possession of trustees or executors may when necessary be protected by the appointment of a receiver, though the court will not upon slight grounds interfere with the possession of the persons in whom the legal estate is vested. A receiver may be appointed to an estate in the hands of a trustee or executor in a case of necessity, where there is danger to the estate owing to improper management, breach of trust, or other misconduct, as where an executor neglects to get in the personal estate or leaves it outstanding in improper securities; so also in the case of the bankruptcy of a sole trustee or executor, and, generally, where it can be proved that the assets are in danger. But unless the assets are being wasted, a receiver will not be appointed

¹ *Duke of Beaufort v. Berty* (1721), 1 P. W. 703, at p. 705; 28 Digest 282, 1330.

so as to prevent an executor from exercising his right of retainer.¹

On a dissolution of partnership in a proper case a receiver of the partnership business may be appointed on the application of one partner as against his co-partners.²

The protection of property which was the subject-matter of litigation was the basis of the early jurisdiction. The Court of Chancery appointed a receiver upon the principle of preserving property pending litigation which was to decide the right of the litigant parties. In such cases the court of necessity exercised a discretion as to whether it would or would not take possession of the property by its officer, and no positive unvarying rule could be laid down as to whether the court would or would not interfere by that kind of interim protection of the property. In all cases, therefore, where the court interfered by appointing a receiver of property in the possession of a defendant before the title of the defendant was established by decree, it exercised a discretion governed by all the circumstances of the case.³ Since the Judicature Acts the same principles are applied, and in a case of sufficient urgency the court will appoint a receiver for the protection of property which is the subject of litigation. For instance, when there is an action pending for the recovery of possession of land there is jurisdiction to appoint a receiver where the plaintiff is seeking to recover the land by a legal title and the defendant is in possession, but in exercising its discretion the court will have regard to all the circumstances of the case.⁴ So where the tenant of a publichouse in breach of his agreement of tenancy closed and left the premises, thereby jeopardising the licences, in an action by the landlords for the recovery of possession, a receiver of the licences and of the rents and profits was appointed pending the litigation and given possession of the premises

¹ *In re Stevens*, [1898] 1 Ch. 162, at p. 173 ; 23 Digest 52, 306.

² *Davy v. Scarth*, [1906] 1 Ch. 55 ; 36 Digest 489, 538.

³ *Owen v. Homan* (1853), 4 L. H. C. 997, at pp. 1032, 1033 ; 39 Digest 32, 397.

⁴ *Foxwell v. Van Grutten*, [1897] 1 Ch. 64 ; 39 Digest 7, 11 ; *John v. John*, [1898] 2 Ch. 573 ; 39 Digest 7, 17.

so far as was necessary for the preservation of the licences.¹

In an appropriate case it is possible to obtain the appointment of a receiver pending litigation regarding probate or administration, or, when necessary, to protect an estate before an administrator is appointed.

The appointment of a receiver as between mortgagor and mortgagee is a form of equitable remedy in frequent use, and is of especial importance in actions by debenture-holders for the realisation of their security. As we have already seen, since the Judicature Acts, a receiver may be appointed at the instance of a legal as well as of an equitable mortgagee, including a debenture-holder.

The winding up of a company does not prevent the debenture-holders from realising their security and obtaining the appointment of a receiver or manager, though it may influence the selection of the person appointed to act in such capacity. Generally when a company is in course of being wound up by the court, and an application for a receiver is made in a debenture-holder's action, the same person is appointed to act as liquidator and also as receiver,² but a receiver previously appointed by the debenture-holders under power given by their security will not usually be displaced by the liquidator, unless the assets are such that they can be more conveniently dealt with by the liquidator.³ Under the Companies Act, 1929, section 307,⁴ where an application is made to the court to appoint a receiver on behalf of the debenture-holders or other creditors of a company the Official Receiver may be so appointed.

Paragraph (2).

Receivers are frequently appointed at the instance of judgment creditors in order to obtain satisfaction of

¹ *Charrington v. Camp*, [1902] 1 Ch. 386; 31 Digest 107, 2434.

² *In re Stubbs*, [1891] 1 Ch. 475; 39 Digest 794, 5004.

³ *Ibid.* See also *British Linen Company v. South American and Mexican Company*, [1894] 1 Ch. 108; 39 Digest 795, 5012.

⁴ 2 Halsbury's Statutes 973.

their judgments against their debtors, or, as it is usually termed, by way of "equitable execution."

In cases where the circumstances render the ordinary forms of legal execution impossible, as where a judgment debtor has merely an equitable interest in property, such as a reversionary interest, which from its nature is not available in legal execution, a receiver may be appointed, whereby the judgment creditor will obtain the benefit of the judgment which could not have been enforced at law.¹ In other words, when by reason of a judgment debtor having only an equitable interest there is a legal impediment to the creditor's remedy at law, he is entitled to come to a Court of Equity, which will give him precisely the same remedy in equity as he would have obtained at law if the debtor's interest had been legal instead of equitable.²

A receiver may be appointed where an impediment exists to ordinary execution, as where the judgment debtor is outside the jurisdiction.³

It should be observed that though the appointment of a receiver is commonly known as "equitable execution" it is not strictly execution. The term "equitable execution" is misleading. It has often been used by judges, and occurs in some orders as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from legal execution. But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law.⁴ A receiver was appointed by the Court of Chancery in aid of a judgment at law, when the plaintiff showed that he had sued out the proper writ of execution, and was met by certain diffi-

¹ *Tyrrell v. Painton*, [1895] 1 Q. B. 202; 39 Digest 43, 518.

² *Cadogan v. Lyric Theatre, Limited*, [1894] 3 Ch. 338, at p. 344, *per* DAVEY, L.J.; 21 Digest 669, 2491.

³ *Goldschmidt v. Oberrheinische Metallwerke*, [1906] 1 K. B. 373; 21 Digest 667, 2470.

⁴ *In re Shephard* (1889), 43 Ch. D. 131, at p. 135, *per* COTTON, L.J.; 21 Digest 664, 2448.

culties arising from the nature of the property, which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a legal debt. Relief by the appointment of a receiver went on the ground that execution could not be had, and, therefore, it was not execution.¹

The appointment of a receiver by way of equitable execution operates as an injunction to restrain the judgment debtor from himself receiving the moneys in respect of which the receiver is appointed.² It has the effect of preventing the debtor from dealing with the moneys to the prejudice of the judgment creditor, and it also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor cannot be taken in execution, or made available by any other legal process.³

It must, however, be remembered that a receiver cannot be appointed by way of equitable execution in cases in which, before the Judicature Acts, there would have been no jurisdiction. When there is no legal impediment to obtaining the execution of a judgment in the ordinary course of law, in the absence of special circumstances a receiver will not be appointed.⁴ If, therefore, legal execution be possible, the equitable remedy by receiver will not be granted merely because it would afford a convenient mode of satisfying the judgment, unless indeed by reason of the conduct of the judgment debtor legal execution is extremely difficult to effect.⁵ Nor could a receiver be appointed in respect of any property or interest, such as the future earnings of a judgment

¹ *In re Shephard* (1889), 43 Ch. D. 131, at p. 138, *per* FRY, L.J.

² *Tyrell v. Painton*, [1895] 1 Q. B., at p. 206; 39 Digest 43, 518; *Lloyds Bank v. Medway Upper Navigation Company*, [1905] 2 K. B. 359; 21 Digest 672, 2514.

³ *In re Marquis of Anglesey*, [1903] 2 Ch. 727, at p. 731, *per* SWINFEN EADY, J.; 21 Digest 657, 2356.

⁴ *Manchester, etc., Banking Company v. Parkinson* (1888), 22 Q. B. D. 173; 21 Digest 666, 2457.

⁵ *Harris v. Beauchamp Brothers*, [1894] 1 Q. B. 801; 21 Digest 665, 2451.

debtor, which was not formerly available either in legal or equitable execution.¹ So in *Cadogan v. Lyric Theatre, Limited*,² the court refused to appoint a receiver by way of equitable execution to receive the future profits of the business of the defendant company, such as moneys paid by the public for entrance to a theatre, though a receiver was appointed of the rents and profits of the company's lands by way of equitable execution without prejudice to the rights of any prior incumbrancers.

Under section 23 of the Partnership Act, 1890,³ on the application by summons of any judgment creditor of a partner, the court may make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same, or a subsequent order, appoint a receiver of that partner's share of profits, whether already declared or accruing, and of any other money which may be coming to him in respect of the partnership.

Order 50, rule 15A, provides that in every case in which an application is made for the appointment of a receiver by way of equitable execution, the court or a judge, in determining whether it is just or convenient that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall so think fit, direct any inquiries on these or other matters before making the appointment.

¹ *Ridout v. Fowler*, [1904] 1 Ch. 658; [1904] 2 Ch. 93; 21 Digest 672, 2520.

² [1894] 3 Ch. 338; 21 Digest 669, 2491.

³ 12 Halsbury's Statutes 538.

BOOK II (C).

Section II. Administration of Assets.

CHAPTER 1.

ASSETS.

SUMMARY.

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ARTICLE 193.

**Meanings of "Assets" and of
"Administration."**

For present purposes by *assets* is meant all the estate of a deceased person which is liable for the payment of his debts.

By *administration* of assets is meant the application of such assets to the payment of the deceased person's funeral and testamentary expenses and debts, and the transfer of the balance to the persons by law entitled to it.

The term "assets," which is derived from the French *assez*, enough, is applied also to the effects of an insolvent person or company which are available for the payment of his or its debts.

Donationes mortis causæ are also liable for the deceased's debts on his assets proving insufficient for the payment of his debts in full.¹ But they cannot themselves be called assets, since they operate not from the deceased's death but from his delivery of them to the donees.² Thus at his death they form no part of the deceased's estate, and are only made liable for his debts for the purpose of preventing frauds on creditors.

ARTICLE 194.

Assets and their Devolution

(1) The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, are assets for the payment of his debts.

(2) All a deceased person's property which is liable for the payment of his debts devolves on his death on his personal representatives. These are if he dies leaving a will the persons appointed by the will to administer his estate, called his executors, and if he dies without appointing any such persons, the persons appointed by the court to administer his estate, called his administrators. In the case of intestacy his estate real and personal devolves on the Probate Judge till an administrator is appointed.

¹ See Article 212.

² *Solicitor to the Treasury v. Lewis*, [1900] 2 Ch. 812; 25 Digest 552, 371.

Paragraph (1).

This is enacted by section 32 (1) of the Administration of Estates Act, 1925.¹

At common law a deceased person's personalty was at all times liable for his debts, and his personalty of course included his leaseholds. The liability of his pure realty was, however, partial and limited.

In the first place, his estates *pur autre vie* seem not to have been liable at all. If there was a special occupant, he, on the tenant's death, took them absolutely; if there was none, then, on the tenant's death, they became *res nullius* until they were seised by a general occupant. In both cases the occupant took by a new title, and was not and could not be made liable for the deceased tenant's debts. This was altered by the Statute of Frauds, 1677, which made estates *pur autre vie* devisable, and enacted that if there was no devise and they went to the heir as special occupant, they were to be assets by descent to the same extent as if they were fees simple, and if there were no special occupant they should go to the executors or administrators of the deceased tenant and be assets in their hands.² This enactment was amended by section 9 of 14 Geo. 2, c. 20, which declared that where the estates went to the executors and administrators they were to administer them as if they were personalty. Both these enactments are repealed and re-enacted and extended to estates *pur autre vie* in incorporeal hereditaments by sections 2, 3 and 6 of the Wills Act, 1837.³

Fee simple estates were liable to the owner's debts to the Crown and judgments recovered against him which were incumbrances on the land. They were also liable for the other debts of the deceased owner where these were secured by deed in which the owner's heirs were bound—that is, the heir was liable personally for such debts to the value of the land which came to him as heir. This liability did not attach where the fee simple was equitable, and it could be defeated by the debtor devising his land

¹ 8 Halsbury's Statutes 323.

² Sect. 12.

³ 20 Halsbury's Statutes 437, 439.

away from the heir. It was extended to equitable fees simple by section 10 of the Statute of Frauds, and to a devisee by the Statute of Fraudulent Devises, 1830. Finally, by 3 & 4 Will. 4, c. 104, all real estate, whether copyhold or freehold, and whether corporeal or incorporeal, not devised for or charged with the payment of debts, was made assets in the hands of the heir or devisee of its late owner, to be administered in Courts of Equity for the payment of his just debts by simple contract as well as by specialty, but debts by specialty in which the heir was bound were to retain priority over debts by specialty in which the heir was not bound and simple contract debts.

Though the words of the Act were all the deceased's "real estate," yet they did not include his estates in fee tail. These were liable for all specialty debts due by him to the Crown¹ and for his judgment debts, but only for the latter when they had actually been made charges on the land during his life.² Nowadays, however, a tenant in tail of full age has power to dispose by will, by means of a devise or bequest referring specifically either to the property or to the instrument under which it was acquired, or to entailed property generally, (a) of all property of which he is tenant in tail in possession at his death, and (b) of money subject to be invested in the purchase of property, of which after it had been so invested he would have been tenant in tail in possession at his death.³ And property of which he does dispose in this way is treated as property over which he has exercised by will a general power of appointment and is made assets for the payment of his debts.⁴

Property over which a person has a general power of appointment—that is, a power to appoint to any one, including himself—is not strictly such person's property, but it is treated in many respects as if it were. Thus when a testator exercised by his will a general power of

¹ 33 Hen. 8, c. 39, sect. 75.

² Land Charges Acts, 1888 and 1900.

³ Law of Property Act, 1925, sect. 176; 15 Halsbury's Statutes 358.

⁴ Administration of Estates Act, 1925, sect. 32 (1); 8 Halsbury's Statutes 323.

appointment, equity treated this as having the effect of making the property so appointed the testator's own, and so assets for the payment of his debts; and even where without expressly exercising such power he attaches to his will a residuary gift, or even gives legacies which after payment of his debts his estate is insufficient to satisfy,¹ this will be held to be an execution of the power as to the whole property included in the general power, or as to so much of it as is necessary to enable the legacies to be satisfied, as the case may be. But if the deceased does not by his will exercise the general power of appointment, the property over which it subsisted belongs to the persons who are to take in default of appointment, and does not form any part of the deceased's assets.²

It is to be noted that once appointed the property over which a power subsisted becomes ordinary assets and subject to the payment of the testator's debts generally. Thus in *Beyfus v. Lawley*³ A. borrowed funds from B. and covenanted with B. to make a will appointing certain property over which he had a general power in such a way as to make the loan a first charge on the property. He made a will appointing it and declaring B. to be entitled to a first charge. It was held, nevertheless, that the property was distributable among A.'s creditors generally and that B. was not entitled to any priority.

Paragraph (2).

The state of the law as set out in the above paragraph has only been arrived at by many steps and comparatively recently.

By the common law all the assets which devolved upon an executor or administrator were the deceased's personalty. Then by section 12 of the Statute of Frauds, 1677, estates *pur autre vie* in freeholds were, in case they had not been devised and where there was no special

¹ *In re Seabrook, Gray v. Baddeley*, [1911] 1 Ch. 151; 23 Digest 397, 4685.

² *Holmes v. Coghill* (1806), 7 Ves. 498; 23 Digest 524, 5912; *Vaughan v. Vanderstegen* (1854), 2 Drew. 363; 27 Digest 143, 1168.

³ [1903] A. C. 411; 23 Digest 524, 5911.

occupant, to vest in the deceased tenant's executors or administrators, but if there was a special occupant they were to be assets by descent in his hands. This enactment was repealed and re-enacted and extended by the Wills Act. These are still called legal assets. The 3 & 4 Will. 4, c. 104,¹ which made all real estate liable for all the debts of deceased, left its devolution to the heir or devisee untouched. The only way in which a creditor not by specialty in which the heir was bound could make it liable in fact was by an administration action.² It would seem, however, that a creditor by specialty in which the heir was bound could sue the heir or devisee in debt after, just as he could before, that Act.³ There seems no reason yet why he should not do so if the executor or administrator has transferred the real estate without paying the creditor's debt. Then by the Land Transfer Act, 1897, the real estate of a deceased person and real estate appointed by him devolved on his executor or administrator. The Act, however, did not extend to legal estates in copyholds, but it did extend to equitable estates in them.⁴ Where the owner in fee simple died intestate his freeholds devolved on his heir until an administrator was appointed.⁵ All assets except legal assets were called equitable assets.

Now copyholds have been abolished and under section 32 of the Administration of Estates Act, 1925,⁶ all property of a deceased person which is liable for the payment of his debts vests in his personal representatives; and where an owner dies intestate his whole estate liable for the payment of his debts devolves on the Probate judge until an administrator is appointed.⁷

Thus the ancient distinction between legal and equitable assets is for practical purposes ended.

¹ 8 Halsbury's Statutes 234.

² *In re Illidge, Davidson v. Illidge* (1884), 27 Ch. D. 478; 23 Digest 353, 4212.

³ *Ibid.*

⁴ Sect. 1. See *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583; 35 Digest 347, 901.

⁵ *In re Griggs*, [1914] 2 Ch. 547; 23 Digest 66, 492.

⁶ 8 Halsbury's Statutes 323.

⁷ Administration of Estates Act, 1925, sect. 9; 8 Halsbury's Statutes 313.

ARTICLE 195.

Assets of a Person having a Foreign Domicile.

Where a person domiciled in a foreign country dies leaving assets in England, then

- (i) So far as the assets are pure personalty, for purposes of representation, of collection and of administration, the law governing them will be the law of England, while for the purposes of distribution it will be the law of the deceased person's domicile.
- (ii) So far as the assets are realty or chattels real they will be governed for all purposes by the law of England.

(i) The general rule is that the law affecting movables is the *lex domicilii*, while the law affecting immovables is the *lex situs*. This rule, however, is subject to the further one that all property of every kind must be recovered according to the law of the place where it is, and the person recovering it must be the person entitled to it by the law of the place where it is. The rule used to be thought to go further, and to make the property recovered subject primarily to the debts and liabilities incurred in the place where it is. It was generally held that all debts contracted in England were payable out of assets situate in England before foreign debts were payable out of such assets.¹ This view, however, was dissented from in *Re Kloebe, Kannreuther v. Geiselbrecht*.² There it was held that the true rule was that English assets must be administered

¹ See *Blackwood v. The Queen* (1882), 8 App. Cas. 82; 11 Digest 366, 457.

² (1884), 28 Ch. D. 175; 24 Digest 813, 8449.

according to English law, and as a debt contracted out of England is payable equally by English law with a debt contracted in England, both debts were payable *pari passu* out of English assets. If, however, foreign law gave foreign creditors a priority, the English court would see that the English creditors would receive compensation therefor out of the English assets.¹

(ii) The division in international law is not into realty and personalty but into immovables and movables. Thus leaseholds, though under Lord Kingsdown's Act wills of leaseholds may be proved as if they were wills of mere personalty, are, just as much as freehold, distributed after the payment of the deceased owner's debts among the persons entitled by the *lex situs*,² quite regardless of the place of his domicile.³ And if in any way the disposition attempted to be made by the will of English leaseholds is contrary to the English law, it is so far void.⁴

¹ And see *Re Doetsch, Matheson v. Ludwig*, [1896] 2 Ch. 836; 36 Digest 386, 604.

² *Pepin v. Bruyere*, [1902] 1 Ch. 24; 11 Digest 342, 299.

³ *In re Moses*, [1908] 2 Ch. 235; 11 Digest 365, 452.

⁴ *In re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584; 11 Digest 364, 449.

BOOK II (C).

Section II. Administration of Assets.

CHAPTER 2.

EXECUTORS AND ADMINISTRATORS.

SUMMARY.

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ARTICLE 196.

Origin of Executors' and Administrators' Authority.

(1) An executor's authority arises under the will, but he cannot give legal proof of his authority until he has proved the will, since a probate copy of the will is the only evidence of the will's contents which the court will admit. It follows from this—

- (i) That an executor who does not join in proof of the will does not thereby cease to be an executor. To cease to be an executor he must renounce.
- (ii) That he may validly do without taking out probate any acts of administration that it is possible to do with-

out proving in a court that he is executor.

- (iii) That he cannot until he has proved the will sue as executor, and
- (iv) That until he has proved the will he cannot be sued as executor unless he has made himself executor *de facto* independently of the will by actually administering, or, as it is called, intermeddling, with the assets.

(2) An administrator's authority arises from and only from the grant of letters of administration by the Court of Probate, and such grant once made relates back to the death of the deceased, and renders valid all acts done in due course of administration by the administrator before the grant. Where, however, a person entitled to letters of administration does acts in due course of administration, but dies without taking letters of administration, such acts become void.

"An executor is a complete executor as to every intent but bringing of actions before probate, so that he may release a debt due to the testator, assent to a legacy, intermeddle with the goods of the testator."¹

"A creditor of a deceased debtor cannot sue a person named as executor in a will of the deceased unless he has either administered, that is, intermeddled with the estate, or proved the will," that is, has not merely applied for, but has been granted, probate by the proper court.²

¹ *Per* POWYS, J., in *Wankford v. Wankford*, 1 Salk. 299, at p. 301; 23 Digest 48, 258.

² *Per* Lord MACNAGHTEN in *Mohamidu Mohideen Hadjar v. Pitchley*, [1894] A. C. 437, at p. 442; 23 Digest 51, 295. The distinction is not without practical importance. See, for instance, *Re Pawley and London and Provincial Bank*, [1901] 1 Ch. 58; 23 Digest 60, 401.

ARTICLE 197.

Number of Executors or Administrators.

A testator is not bound to appoint more than one person to be his executor; but he may, if he so wishes, appoint any number. The court, however, will not grant probate to more than four persons in respect of the same property, nor will it grant letters of administration to more than four administrators in respect of the same property.

This is enacted by section 160 of the Judicature Act, 1925.¹ In the case of *In the Estate of Holland*² a testator appointed four persons to be his executors in respect of his will and a fifth person to be his literary executor in respect of certain manuscripts; and the first four applied for probate in respect of the testator's estate other than the manuscripts. The grant of probate was refused on the ground that the section precludes the granting of probate to more than four persons in respect of the whole of the testator's estate.³

It is also provided by statute⁴ that, in a case where there is only one personal representative (not being a trust corporation), then, during the minority of a beneficiary or the subsistence of a life interest and until the estate is fully administered, the court may appoint one or more personal representatives in addition to the original representative.

¹ 8 Halsbury's Statutes 371.

² [1936] 3 All E. R. 13; Digest Supp.

³ It is doubtful whether this case was rightly decided. The section does not use the word "estate" but the word "property." The two words are not necessarily synonymous, though BUCKNELL, J., treated them so.

⁴ Supreme Court of Judicature (Consolidation) Act, 1925, sect. 160 (2); 8 Halsbury's Statutes 371.

ARTICLE 198.

Offices of Executors and Administrators.

(1) On the death of a sole executor before he has fully administered the assets of his testator, his executor (who is called an *administrator de bonis non*) is entitled to complete such administration; and he has the same rights and is subject to the same obligations as the original executor.

(2) On the death of a sole executor intestate or of a sole administrator testate or intestate before he has fully administered, his office determines and new letters of administration have to be applied for.

Paragraph (1).

The law as to succession to executors set out very shortly above is set out fully in section 7 of the Administration of Estates Act, 1925.¹

ARTICLE 199.

Special Executors.

An executor may be either general or special. He is said to be a special executor if his appointment is limited as to property, as to place or as to time, or if it is made subject to a condition precedent or determinable on the happening of a condition subsequent.

By section 22 of the Administration of Estates Act, 1925,² a testator may appoint, and in default of such

¹ 8 Halsbury's Statutes 311.

² 8 Halsbury's Statutes 314.

express appointment will be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land.¹

ARTICLE 200.

Executors and Administrators may act Separately.

(1) Where there are several co-executors they are not bound to act jointly, and any act done by one of them in his character of executor is as valid at law as if it had been done by all subject to the following exceptions and qualifications :

(i) Under section 18 of the Companies Clauses Act, 1845,² stock governed by that Act cannot be dealt with by executors as owners till it is registered in the names of all those who prove the will, and a transfer has no effect unless it is executed by them all and under section 23 of the National Debt Act, 1870,³ the Banks of England and Ireland respectively may require transfers of Government stock to be executed by all the executors who have proved the will.

(ii) A sale of a testator's real estate *which now for administration purposes includes chattels real* cannot, without

¹ See *In the Estate of Clifton*, [1931] P. 222; Digest Supp.

² 2 Halsbury's Statutes 653.

³ 16 Halsbury's Statutes 261.

the consent of the court, be made, except by all his administrators or all the executors who have proved the will.

- (iii) Where a person has contracted with one only of several executors, if the contract is not carried out the court may refuse such person equitable relief.

(2) The above exceptions to and qualification of the power of one of several executors to act alone apply equally in the case of joint administrators.

Formerly it was only a will of personalty which needed proof, just as it was only over personalty that the executor had any control by virtue of his office. If a will disposed of pure realty only, it could not be proved.

This was altered by section 2 of the Land Transfer Act, 1897, which gave executors and administrators control over pure realty and provides that all enactments and rules of law relating to the effect of probate and letters of administration as respects chattels real and as respects the dealing with chattels real before probate or administration, should apply to real estate, and now by section 2 of the Administration of Estates Act, 1925,¹ all powers, rights, duties, equities, obligations and liabilities of a personal representative in force before 1926 with respect to chattels real, are to apply and attach to the personal representative and have effect with respect to real estate vested in him.

Paragraph (1).

The qualification that one co-trustee cannot act alone unless he purports to act as executor is founded on the decision of the Court of Appeal in *Solomon v. Attenborough*.² There two persons were co-executors and

¹ 8 Halsbury's Statutes 307.

² [1912] 1 Ch. 451; 24 Digest 571, 6082.

co-trustees of a will. After the estate had been administered so far as payment of debts and legacies was concerned, one of them without the other's knowledge pawned part of the testator's plate for his own benefit, and without disclosing to the pawnbroker that he held it as executor. *Joyce, J.*, held¹ that the pawnbroker took a good legal charge as against the other executor. The majority of the Court of Appeal reversed this decision on the ground that to give a good title one co-executor must act in giving it in his character of executor. No authority whatever was cited in support of this view. The court's decision was affirmed in the House of Lords,² but solely on the ground that the testator's debts having been paid and the duties of the executors having been fulfilled at the time the plate was pawned, the pawner though still an executor, for once an executor always an executor, was in fact acting as a trustee.

(i) and (ii) The provisions of the Companies Clauses Act, 1845,³ and the National Debt Act, 1870,⁴ apply to executors who have proved, while those of the Land Transfer Act, 1897, applied to all his personal representatives. Accordingly, it was held that where several persons were appointed executors by the will, and only some of them proved, the others who did not prove, but who had not renounced, had to join in selling the realty.⁵ Where, however, a testator who had assets in England and assets abroad appointed one set of executors for his English estate and another set for his foreign estate, the former alone were all "his personal representatives" within section 2 of the Land Transfer Act, 1897, and could dispose of his English realty without the concurrence of the latter.⁶

¹ [1911] 2 Ch. 159.

² *George Attenborough and Son v. Solomon*, [1913] A. C. 76; 24 Digest 571, 6082. See also *In re Ponder*, [1921] 2 Ch. 59; 23 Digest 464, 5357.

³ 2 Halsbury's Statutes 648.

⁴ 16 Halsbury's Statutes 258.

⁵ *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58; 24 Digest 576, 6126.

⁶ *Re Cohen's Trustees*, [1902] 1 Ch. 187; 24 Digest 583, 6167.

The necessity for all executors joining in transferring a testator's real estate was abolished by section 12 of the Conveyancing Act, 1911, and now section 8 of the Administration of Estates Act, 1925,¹ provides that where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, all the powers which are by law conferred on the personal representative may be exercised by the proving executor or executors for the time being and shall be as effectual as if all the persons named as executors had concurred therein.²

Subject to the limitation that all the executors who have proved must join in a sale of their testator's interests in land the executors have all the powers over them so far as disposing of it is concerned that they have at common law over the testator's personalty.³

(iii) Thus where one executor contracts unknown to the others for the sale of a specific chattel, and afterwards, on failure to carry out the contract, the purchaser sues for specific performance, the court may, and, if the purchaser knew the executor was acting against the wishes of his colleagues, will, refuse him relief.⁴

Paragraph (2).

It was not customary to appoint joint administrators, and it was not very clear whether when they were appointed they must act jointly or were capable of acting separately like executors.⁵ Now, however, all doubts are removed by section 21 of the Administration of Estates Act, 1925,⁶ which enacts that every person to whom administration is granted shall, subject to the limitations contained in the grant, have the same rights and liabilities as if he were an executor.

¹ This is so whether the testator died before or after the commencement of the Act.

² 8 Halsbury's Statutes 313.

³ *In re Kemnal*, [1923] 1 Ch. 294; 24 Digest 581, 6153.

⁴ *Re Ingham*, [1893] 1 Ch. 353, at p. 360; 24 Digest 612, 6427.

⁵ *Jacomb v. Howard* (1751), 2 Ves. Sen. 265; 24 Digest 565, 6030; *Hudson v. Hudson* (1737), West. t. Hard. 155; 24 Digest 611, 6424.

⁶ 8 Halsbury's Statutes 314.

ARTICLE 201.

Executor de son tort.

(1) An executor *de son tort* is one who intermeddles with a deceased person's assets, and who, upon being sued as executor, is unable to prove his title to administer under the deceased's wills or letters of administration.

(2) An executor *de son tort* has few of the rights of an executor, but he is subject to all an executor's duties save that he is not liable for assets which he has not received.

As was said in *Carmichael v. Carmichael*,¹ an executor *de son tort* had all the liabilities of a lawful executor, but none of the advantages.

Thus it was held that he had no right to retain his own debt.² It seems probable, however, that the law in this respect has been altered by the unhappily phrased provisions of section 28 of the Administration of Estates Act, 1925,³ which enacts that "if any person, to the defrauding of creditors or without full valuable consideration, obtains, receives or holds any real or personal estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the real and personal estate received or coming to his hands, or the debt or liability released, after deducting—

- (a) any debt for valuable consideration due to him from the deceased person at the time of his death; and
- (b) any payment made by him which might properly be made by a personal representative."

Some of the phraseology of that section seems destined to cause difficulty to the court which first has to construe it; but the provision that item (a) may be deducted

¹ (1846), 2 Phil. 101; 23 Digest 76, 615.

² See Article 208.

³ 8 Halsbury's Statutes 320.

certainly appears to contemplate the exercise of a right of retainer in cases falling within the section.

An executor *de son tort* is liable to pay death duties as far as the assets have come into his hands.¹ He is also like a legal personal representative liable for any waste or conversion to his own use of the deceased's assets.² He differs from an executor who has taken probate in this respect, that he is not liable for assets lost to the estate through his default,³ and he cannot be compelled to take probate as an executor who has intermeddled with his testator's assets may be.⁴

A person who intermeddles with a testator's assets as the agent of a lawful executor who has not taken probate, is not an executor *de son tort*, but if he is called to account and is unable to prove the lawful executor's title he is in the same position as if he were an executor *de son tort*.⁵ A lawful executor himself who has not taken probate is in the same position except that he can be compelled to take or renounce probate.⁶

ARTICLE 202.

Who may claim Letters of Administration on Intestacy.

(1) The court has a wide discretion to grant administration. If the deceased dies wholly intestate administration normally will be granted to some one or more of the persons interested in the residuary estate, if they make an application for the purpose ; and as regards

¹ *New York Breweries Company v. Attorney-General*, [1899] A. C. 62 ; 23 Digest 77, 645.

² And see Administration of Estates Act, 1925, sect. 29.

³ *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162, at p. 176 ; 23 Digest 52, 306.

⁴ *Rowse v. Morris* (1873), L. R. 17 Eq. 20 ; 23 Digest 78, 650.

⁵ *New York Breweries Company v. Attorney-General*, *supra*.

⁶ Judicature Act, 1925, sect. 159 ; 8 Halsbury's Statutes 371.

lands settled previously to the death of the deceased, administration normally will be granted to the trustees, if any, of the settlement, if they are willing to act.

(2) But if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the court to be necessary or expedient to appoint as administrator some person other than the person who would otherwise have been entitled under paragraph (1), the court may in its discretion appoint as administrator such person as it thinks expedient, and it may also limit, in any way it thinks fit, the administration so granted.

The law as stated in these two paragraphs is the effect of section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by section 9 of the Administration of Justice Act, 1928.¹ It applies only to the estates of persons dying after 1925.

Formerly, a husband had a prior and exclusive right to claim letters of administration to the estate of his deceased wife, or even to administer it without letters.² Conversely, a statute of the reign of Henry VIII.³ provided, in effect, that if the deceased left a widow administration should be granted to the widow or the next of kin or to both at the discretion of the ordinary, and, in practice, the widow generally was preferred to the next of kin of the deceased. Subject to this, administration usually was granted to the next of kin of the deceased, and, if part of the assets consisted of land held for an estate in fee simple and the heir was not one of the next of kin, the heir was equally entitled to administration with the next of kin.⁴

These rules, however, were not absolute, because

¹ 8 Halsbury's Statutes 372.

² *Humphrey v. Bullen*, 1 Atk. 458; 23 Digest 305, 3700; *Sir George Sand's Case*, 3 Salk. 22.

³ 21 Hen. VIII, c. 5; 8 Halsbury's Statutes 271.

⁴ See Land Transfer Act, 1897, sect. 2 (4).

section 73 of the Court of Probate Act, 1857,¹ gave to the court a discretion as to the persons to whom administration should be granted. That discretion has been continued by the statutory provisions summarised in the Article. Subject to that discretion, the normal rule now is, as stated in the Article, that administration will be granted "to some one or more of the persons interested in the residuary estate, if they make an application for the purpose." Those persons are indicated by sections 46 and 47 of the Administration of Estates Act, 1925.² Under those sections a surviving spouse still has a prior claim to administration; and, after the surviving spouse, if any, the following persons normally may claim administration in the following order:

- (1) The children or other issue of the intestate;
- (2) If the intestate leaves no issue, the parents, or surviving parent, of the intestate;
- (3) If the intestate leaves neither issue nor parent, the brothers and sisters of the whole blood of the intestate or their issue;
- (4) In default of persons so qualified, the brothers and sisters of the half-blood of the intestate or their issue;
- (5) If there are no such persons, the grandparents of the intestate;
- (6) Failing them, the uncles and aunts of the whole blood of the intestate, or their issue;
- (7) In default of such persons, the uncles and aunts of the half-blood of the intestate, or their issue;
- (8) Failing any of the foregoing, the Crown or the Duchy of Lancaster or the Duke of Cornwall.

These rules, however, are all subject to the overriding principle that the court has a discretion as to the persons to whom administration should be granted, and in the exercise of that discretion the court follows rules which have been settled by authority. Thus, where several persons have an equal claim, letters of administration usually will be granted to the first applicant or applicants.

¹ 8 Halsbury's Statutes 291.

² 8 Halsbury's Statutes 346-348.

Again, the court may grant administration to a trust corporation¹ either solely or jointly with another person. Similarly, in a case where none of the persons entitled on intestacy will take out administration, general administration may be granted to a creditor of the estate, if he applies for it, on the ground that a creditor cannot be paid until a representative of the estate has been appointed.²

But special circumstances will always be considered. In a recent case, the persons entitled on intestacy were unable to agree which of them should take out letters of administration. They signed, therefore, an act of renunciation in which they consented, subject to the approval of the court, to certain persons taking out administration; and the court, in the exercise of its discretion, approved of the grant of letters of administration to those persons.³

ARTICLE 203.

Who may be granted Letters of Administration where there is a Will.

(1) Where a deceased person leaves a will but through any cause there is no executor, or no executor willing or able to administer the assets, the Court of Probate will appoint an administrator *cum testamento annexo*. Such an administrator has so long as his office continues all the powers and rights of an executor. The court usually appoints as administrator

¹ *I.e.*, the Public Trustee or a corporation, appointed by the court in any particular case or entitled by rules made under section 4 (3) of the Public Trustee Act, 1906, to act as a custodian trustee: Administration of Estates Act, 1925, sect. 55 (1) (xxvi), as amended by Law of Property (Amendment) Act, 1926, sect. 2; 8 Halsbury's Statutes 358.

² *Re Legnia* (1936), 105 L. J. P. 72; Digest Supp.

³ *Re Morgans* (1931), 145 T. T. 392; Digest Supp. See also *In the Estate of Potticary*, [1927] P. 202; Digest Supp.; *In the Goods of Ray* (1926), 136 L. T. 640; Digest Supp.; *In the Estate of Simpson*, *In the Estate of Gunning*, [1936] P. 40; Digest Supp.

cum testamento annexo the residuary legatee under the will.

(2) Where the sole executor appointed is an infant, the court will appoint an administrator *durante minore ætate* to administer the assets until the infant attains full age. The court usually appoints as administrator *durante minore ætate* the infant executor's guardian.

(3) Where an action respecting the validity of an alleged will of the deceased or of the obtaining, recalling, or revoking any probate or any grant of administration is pending, the Court of Probate may appoint an administrator *pendente lite*. Such an administrator has all the powers of an executor except the right to distribute the assets among the beneficiaries, and he may be allowed such remuneration out of the assets as the court thinks proper.

The paragraphs simply state shortly the law as laid down now in the Supreme Court of Judicature (Consolidation) Act, 1925, section 166 ¹ (as to grants with will annexed), section 165 (as to grants during an infant's minority), and section 163 ² (as to grants pending litigation). These merely enact the previous law, subject to this alteration, that since an infant cannot now be a trustee or a personal representative no interest in his testator's estate vests in him till probate is granted to him after he has attained full age.

¹ 8 Halsbury's Statutes 374.

² 8 Halsbury's Statutes 373.

ARTICLE 204.

**Powers of Personal Representatives
over Assets.**

(1) As regards common law assets the power of personal representatives was absolute. They could give a good title to them by sale, where no sale was necessary, or by gift. In equity, however, as against creditors and beneficiaries, a gift of assets is void, and so is a sale where to the knowledge of the purchaser the sale was made by the personal representative for the purpose of misapplying the purchase money.

(2) Personal representatives now have the same powers over real estate *which now includes merely chattels real* as they have over personal estate vesting in them, save that it is not lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer land (except where they could have disposed of real estate before the Act).

(3) A personal representative has the same powers to pay or allow any debt or claim on any evidence that he thinks sufficient, and to arrange or compromise any debt or claim in the same way as two trustees or a trust corporation are entitled to do.

Paragraph (1).

The common law rule was that the executor or administrator was absolute master of the deceased's goods subject to a personal liability to account for them or their proceeds. Equity constituted him a trustee of the goods and applied the rules as to trust estates to the assets and

his dealings with them.¹ But in many respects his position is still different from that of an express trustee. Thus he can plead the Statute of Limitations in an action against him for *devastavit* or for the recovery of a legacy,² and he can favour his own or another's debt.³

Paragraph (2).

The general rule was that a person purchasing property from a personal representative was not entitled to enquire whether there were any debts of the deceased still unpaid. The rule was the same *primâ facie* whether the property being purchased was realty or personalty ; but, as regards realty, the rule only operated for a period of twenty years from the death of the deceased. After that period had elapsed a purchaser of realty was not merely entitled, but bound to enquire whether any debts of the deceased remained unpaid, because after the expiration of that period the presumption arose that any debts which had not been paid had become statute-barred.⁴ On the other hand, if the property being purchased was personalty—and leasehold land was regarded as personalty—the rule was different. The presumption still arose that after twenty years from the death all debts were paid or statute-barred. Nevertheless, that presumption did not affect the purchaser of personalty, unless he had notice of an irregularity,⁵ because a personal representative always had very wide powers of dealing with personalty. His powers with regard to personalty were not confined to the payment of debts out of it, and, even though twenty years had elapsed, the presumption was that he was still acting in the due discharge of his duties as personal representative.⁶

Part I of the Land Transfer Act, 1897, enabled a personal representative to deal with real estate as if it were

¹ See *Scott v. Tyler* (1788), 2 Dick. 712 ; 24 Digest 566, 6045.

² *Infra*, Article 221.

³ *Infra*, Articles 208, 209.

⁴ *Re Tanqueray-Willoume and Landau* (1882), 20 Ch. D. 465 ; 24 Digest 585, 6188.

⁵ *Re Verrell*, [1903] 1 Ch. 65 ; 24 Digest 572, 6097.

⁶ *Re Venn and Furze's Contract*, [1894] 2 Ch. 101 ; 24 Digest 575, 6117.

a chattel real vested in him. Doubts then arose whether a person purchasing realty from a personal representative was in the same position as a purchaser of personalty. The better opinion was that he was. And now all doubts are removed by section 36 (8) of the Administration of Estates Act, 1925,¹ which applies to all conveyances made after 1925 and enacts that a conveyance of a legal estate in land shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary expenses, duties and legacies, have been discharged or provided for.

The same section gives further protection to the purchaser by providing that a statement in writing by a personal representative that he has not given an assent in respect of a legal estate will protect a purchaser unless (i) there has been a previous disposition made in favour of another purchaser, or (ii) notice of a previous assent affecting the legal estate has been placed on the probate or letters of administration.

Paragraph (3).

The powers depend on section 15 of the Trustee Act, 1925.²

The wide reading of the section adopted by the courts is shown in the case of *Re Houghton, Hawley v. Blake*.³ There the widow of a testator was joint executrix with another person. The widow claimed that certain investments standing in the testator's name had really been made with her money and on her behalf. The other executor having investigated the matter and come honestly to the conclusion that the widow's claim was just, transferred the investments to her. It was held that he was entitled so to do.

It sometimes happens that a person appointed executor by one will obtains probate of it being unaware of a later will made by the testator, or that the court appoints a person administrator of a deceased's estate under the

¹ 8 Halsbury's Statutes 335.

² 20 Halsbury's Statutes 108.

³ [1904] 1 Ch. 622; 24 Digest 587, 6208.

belief that he died intestate when in fact he left a will appointing an executor. In such cases all acts done by the executor or administrator in the due administration of the deceased's assets are legally binding on all parties to them, and his authority to act legally as executor or administrator continues till probate or the letters of administration are revoked.¹

¹ *Hewson v. Shelley*, [1914] 2 Ch. 13; 23 Digest 236, 2878. Administration of Estates Act, 1925, sect. 37; 8 Halsbury's Statutes 337.

BOOK II (C).

Section II. Administration of Assets.

CHAPTER 3.

PAYMENTS OF LIABILITIES AND DEBTS.

SUMMARY.

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ARTICLE 205.

First Charges on Assets.

The following constitute first charges upon the assets of a deceased person :

- (i) The expenses incurred in burying the deceased in a manner suitable to his condition in life.
- (ii) Testamentary expenses and all other costs properly incurred by the personal representatives in the due administration of the assets.

The law is now set out in section 33 of the Administration of Estates Act, 1925.¹

Though there can be, by the law of England, no property in a human body living or dead,¹ yet the executor has a right to the custody of his testator's body for the purpose of burial. And he is entitled to bury it in a manner suitable to the testator's condition whatever may be the directions (if any) given by the testator, by will or otherwise, on the subject.²

For expenses so incurred and for the costs of administration the personal representatives are personally liable, but are entitled to an indemnity out of the estate just as are trustees.³

This right is in no way affected by the insolvency of the deceased's estate.⁴

ARTICLE 206.

Order of Payment of Debts.

Whether a person dies testate or intestate, if his assets are sufficient to pay his funeral and testamentary expenses and all his debts and liabilities in full his estate is solvent. In such a case it does not matter in what order those expenses, debts and liabilities are discharged. But if the estate is insolvent, expenses, debts and liabilities must be discharged in a prescribed order; and, even where an estate is apparently solvent, it may be advisable for a personal representative to adhere strictly to the prescribed order in case the estate which appears to be solvent should turn out to be insolvent. The prescribed order now is as follows:

¹ *R. v. Sharp* (1857), Dear. & Bell. C. C. 160; 15 Digest 904, 9924.

² *Williams v. Williams* (1882), 20 Ch. D. 659; 7 Digest 563, 379.

³ Article 60.

⁴ Bankruptcy Act, 1914, sect. 130 (6); 1 Halsbury's Statutes 691.

- (1) The funeral and testamentary and administration expenses have priority ; and
- (2) Subject to the priority given to those expenses, the same rules must be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

This article summarises briefly the law applicable to the estates of persons who have died since 1925. In the case of deaths which occurred before 1926, the order of payment varied according to how the estate was being administered ; and there were, and indeed still are, three possible methods of administering the insolvent estate of a deceased person ; namely,

- (a) By the personal representative out of court ;
- (b) By the Chancery Division as the result of an order or judgment in an action for administration. Proceedings for administration may be taken by the personal representative himself, or by a beneficiary or by a creditor.¹ The court has a discretion, and it will refuse to make the order if it considers that the estate can be administered properly without it,² and it also has power, in

¹ Order LV, rr. 3 and 4. County Courts have a concurrent jurisdiction in cases where the value of the estate does not exceed £500, and in cases where the gross value of the estate is less than £1,000, any person who, in the opinion of the Public Trustee, would be entitled to apply to the court for administration may apply to the Public Trustee to administer the estate.

² *Re Stocken* (1888), 38 Ch. D. 319 ; 24 Digest 782, 8136.

cases where but a few points call for judicial decision, to make an order for partial administration;¹

- (c) In Bankruptcy. By section 130 of the Bankruptcy Act, 1914, any creditor of a deceased debtor, whose debt would have been sufficient to support a bankruptcy petition had the debtor been alive, may present a petition as if the debtor were living, and the Court of Bankruptcy, unless it is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, may make an order for the administration in bankruptcy of the estate. A petition for administration in bankruptcy cannot be presented after proceedings for the administration of the estate have been commenced in another court; but that court may, if it thinks fit, transfer the administration to the Court of Bankruptcy. This power of transfer is discretionary, and the court in exercising it will have regard chiefly to considerations of convenience and expense.² Generally, however, the court will grant the transfer unless the Chancery proceedings are far advanced or difficult points of law are likely to arise.³

In the case of a death which occurred before 1926, the order of priority in the payment of expenses, debts and liabilities depended on which of these three methods of administration was being used; so that we had, in effect, three sets of rules governing priorities and applicable to insolvent estates. The student who is sufficiently interested can find a discussion of those rules in earlier editions of this work. We do not propose to set them out here, because they are of diminishing importance, since the Administration of Estates Act, 1925,⁴ provided, as

¹ Order LV, r. 10.

² *Re Baker* (1890), 44 Ch. D. 262; 4 Digest 502, 4523.

³ *Re Kenward* (1906), 94 L. T. 277; 4 Digest 502, 4525; *Re Hay*, [1915] 2 Ch. 199; 4 Digest 252, 4518.

⁴ Part I of the First Schedule, para. 2; 8 Halsbury's Statutes 362.

stated in the Article, that in the administration of the insolvent estate of any person who dies after 1925, funeral, testamentary and administration expenses are to have priority and, subject to that, the same rules are to be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

Thus, while the three alternative methods of administration discussed above still remain, we have a uniform scheme of priority in payment which must be used in all cases where the estate of the deceased is insolvent. In view of this it is curious that the Act has not given us a statutory definition of insolvency. Insolvency, it has been held,¹ is a question of fact; and the court has power to direct an enquiry on this question.² At the same time, it is a question which, on occasion, may cause considerable difficulty.³

It should be emphasised that the Administration of Estates Act, 1925, does not import into the administration of the insolvent estate of a deceased person the law of bankruptcy in general. Thus, those rules of bankruptcy which make available to creditors property which was not the bankrupt's own but of which he was merely the reputed owner, and the rules which relate to fraudulent preference and the avoidance of voluntary settlements are not applicable.⁴ Nothing more is imported than the law of bankruptcy on the topics expressly mentioned; and it now becomes necessary for us to indicate the bankruptcy law on those topics:—

(1) *The respective rights of secured and unsecured creditors.*—Under the Bankruptcy Act, 1914,⁵ a secured

¹ *Re Pink*, [1927] 1 Ch. 237; Digest Supp.

² *Re Smith* (1883), 22 Ch. D. 586; 4 Digest 505, 4558.

³ See, for instance, *Whitaker v. Palmer*, [1904] 1 Ch. 299; 24 Digest 820, 8520.

⁴ *Hasluck v. Clark*, [1899] 1 Q. B. 699; 24 Digest 817, 8503.

⁵ Schedule II, 10–12; 1 Halsbury's Statutes 709.

creditor has three alternate courses open to him, and he may—

- (a) realise his security and prove for the balance, if any, of the debt, which remains to him, or
- (b) surrender his security and prove for the full amount of his debt, or
- (c) set a value on his security and prove for the balance of his claim, but in this last case the personal representative, or trustee in bankruptcy, may redeem the security, or cause it to be sold, at the amount at which it is so valued.

In so far as the secured creditor proves for his debt, or part of it, under the foregoing rules he enjoys no priority but ranks with the unsecured creditors. The rules enable him to take advantage, if he wishes, of his security, but they give him no superiority over unsecured creditors beyond that which is inherent in his security.

(2) *Debts and Liabilities Provable.*—The law of bankruptcy on this topic is very detailed ; but for our present purpose it is sufficient to notice that by the Bankruptcy Act, 1914, there are three classes of debts or liabilities which are not provable ; namely :—

- (a) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust.¹ This, however, is subject to an important modification which was introduced by the Law Reform (Miscellaneous Provisions) Act, 1934.² That Act provides that, subject to certain provisions therein contained, on the death of any person after the commencement of the Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate ; and it further enacts that, in the event of the insolvency of an estate against which proceedings are maintainable by virtue of that

¹ Bankruptcy Act, 1914, sect. 30 (1) ; 1 Halsbury's Statutes 636.

² Sect. 1 ; 27 Halsbury's Statutes 222.

provision, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust ;

- (b) Debts or liabilities contracted by the debtor with any person after that person had notice of an available act of bankruptcy ;¹
- (c) Contingent debts and liabilities of which, in the opinion of the court, the value cannot be fairly estimated.²

All other debts and liabilities, present or future, certain or contingent, to which the deceased was subject at the time of his death or to which, it appears, his estate may become subject by reason of any obligation incurred by him are provable.³

(3) *The Valuation of Annuities and Future and Contingent Liabilities.*—If an annuity is not in arrear the annuitant is not a creditor who can apply for an administration order ; but it has been held that when such an order has been made the annuitant may prove for the estimated value of the annuity ;⁴ and it would seem to follow that a personal representative administering an insolvent estate out of court must admit such proof. In the same way bankruptcy law admits proof of liabilities which are future or contingent. But the rule is that proof can only be admitted for a definite sum ; and the Bankruptcy Act, 1914,⁵ lays down that the trustee in bankruptcy, or personal representative must, if possible, estimate the value of any debt or liability the value of which is uncertain. Any person aggrieved by his

¹ Bankruptcy Act, 1914, sect. 30 (2) ; 1 Halsbury's Statutes 636.

² *Ibid.*, sect. 30 (6) ; 1 Halsbury's Statutes 637.

³ *Ibid.*, sect. 30 (3) (8) ; 1 Halsbury's Statutes 637.

⁴ *Re Hargreaves* (1890), 44 Ch. D. 236 ; 24 Digest 753, 7807.

⁵ Section 30 (4) ; 1 Halsbury's Statutes 636. Section 30 (5) (7) ; 1 Halsbury's Statutes 637.

estimate may appeal to the court.¹ But, as we have already pointed out, if the court is of opinion that the value cannot be fairly estimated there can be no proof.

(4) *The Priorities of Debts and Liabilities.*—The general rule in bankruptcy is that all debts are to be treated equally. This rule, however, is subject to important exceptions, and bankruptcy law recognises both a class of preferred debts and also a class of deferred debts. Before dealing with these two classes, however, it will be convenient for us to note that there are certain debts to which special priorities are given by particular statutes.

Thus section 35 of the Friendly Societies Act, 1896,² provides that on the bankruptcy of an officer of a Friendly Society, who, by virtue of his office, has in his possession any money or property of the society, the trustees of the society shall have a right to receive the same in preference to other debts and claims against his estate.³ And the trustees of a savings bank are entitled, by statute,⁴ to a similar special priority. It appears that in these cases the claims of the trustees have priority over all other claims with the exception of the claim of the personal representative to funeral and testamentary and administration expenses.⁵

The preferred debts of bankruptcy law rank after the debts, if any, enjoying such special priority, though, as between themselves, they rank equally. They are as follows:

- (a) All arrears of local rates⁶ due from the deceased at the date of his death, but only so far as they became payable during the twelve months immediately preceding his death, and all taxes assessed on the deceased up to the 5th of April next before his death,⁷ but not in any case exceeding in all one year's assessment;⁸

¹ Sect. 30 (5); 1 Halsbury's Statutes 637.

² 8 Halsbury's Statutes 953.

³ See *Re Welch*, 1 Man. 62; 4 Digest 472, 4262; *Re Eilbeck*, [1910] 1 K. B. 136; 4 Digest 471, 4250.

⁴ Trustee Savings Bank Act, 1863, sect. 14; 17 Halsbury's Statutes 718. Bankruptcy Act, 1914, sect. 33 (9); 1 Halsbury's Statutes 540.

⁵ *Re Miller*, [1893] 1 Q. B. 327; 4 Digest 472, 4265.

⁶ See *Re Ellwood*, [1927] 1 Ch. 455; Digest Supp.

⁷ *Gowers v. Walker*, [1930] 1 Ch. 260; Digest Supp.

⁸ Bankruptcy Act, 1914, sect. 33 (1) (a); 1 Halsbury's Statutes 638.

- (b) The amount due to any clerk or servant in respect of wages or salary for services rendered to the deceased during four months before his death, but not exceeding £50 ;¹
- (c) The amount due to any labourer or workman in respect of wages for services rendered to the deceased during two months before his death, but not exceeding £25 ;²
- (d) Any amount due from the deceased to a workman in respect of compensation under the Workmen's Compensation Acts, the liability for which accrued before the death of the deceased ;³
- (e) Contributions payable under the National Health Insurance Acts, 1936 to 1938, the Unemployment Insurance Acts, 1935 to 1938, and the Widows and Orphans and Old Age Contributory Pensions Acts, 1936 and 1937, in respect of employed persons during twelve months before the death of the deceased.⁴

Creditors in respect of liabilities of any of these five classes rank equally among themselves ; and they are entitled to be paid in full, if the assets are sufficient for the purpose, before the ordinary creditors receive anything. If any assets remain after the preferred creditors have been paid in full, it is applied in or towards satisfaction of the claims of the ordinary creditors for valuable consideration, who rank equally among themselves. If, but only if, such ordinary creditors have been paid in full, any assets remaining are applied in or towards satisfaction of the claims of deferred creditors. There are two classes of deferred debts ; namely :—

- (a) Money advanced to a person engaged or about to engage in any business, on a contract that the

¹ Bankruptcy Act, 1914, sect. 33 (1) (b) ; 1 Halsbury's Statutes 638.

² *Ibid.*, sect. 33 (1) (c) ; 1 Halsbury's Statutes 638.

³ *Ibid.*, sect. 33 (1) (d) ; 1 Halsbury's Statutes 638. Workmen's Compensation Act, 1923, sect. 31, 2nd Schedule ; 11 Halsbury's Statutes 513. Workmen's Compensation Act, 1925, sect. 7 (3) ; 11 Halsbury's Statutes 534.

⁴ *Ibid.*, sect. 33 (1) (e) ; 1 Halsbury's Statutes 639.

lender is to receive a rate of interest varying with the profits or a share of the profits of the business, and sums due to the vendor of the goodwill of a business where the goodwill is sold on the terms that the vendor is to receive a share of the profits. With regard to such debts it is enacted that the lender, or, as the case may be, the vendor cannot recover anything until the claims of the other creditors of the borrower for valuable consideration have been paid in full.¹

- (b) Money or other property lent or entrusted by a wife to her husband or by a husband to his wife for the purpose of any business carried on by the husband or, as the case may be, the wife. In such cases the lender cannot claim anything out of the estate of the deceased until all the claims of other creditors for valuable consideration in money or money's worth have been satisfied.²

Finally, we should notice that if a landlord or other person entitled to distrain on the goods of the deceased has done so the distress will *primâ facie* be available to satisfy his claim, and he may prove against the estate for any balance.³ This may affect the application of the rules of priority given above. If, however, the distress has been levied within three months preceding the death of the deceased, the preferred debts mentioned above become a first charge on the goods distrained on or the proceeds of sale thereof; but if the landlord, or any other person, pays off the charge the landlord, or other person, takes the place of the person to whom payment is made and becomes entitled to his rights of priority.⁴

¹ Partnership Act, 1890, sects. 2, 3; 12 Halsbury's Statutes 530, 532. Bankruptcy Act, 1914, sect. 33 (9); 1 Halsbury's Statutes 640.

² Bankruptcy Act, 1914, sect. 36 (1) (2); 1 Halsbury's Statutes 642.

³ *Ibid.*, sect. 35; 1 Halsbury's Statutes 641.

⁴ *Ibid.*, sect. 33 (4); 1 Halsbury's Statutes 639.

ARTICLE 207.

Statute-barred Debts.

(1) Personal representatives are entitled to pay any debt of the deceased which but for the Statutes of Limitations would be recoverable against his estate, provided such debt has not been adjudicated upon and held statute-barred.

(2) This right is not lost upon an order for administration being made, but after such order or upon any application being made to the court in respect of such debt, then if any one interested in the estate objects to the payment of the statute-barred debt, the court will restrain the personal representatives from paying it.

Paragraph (1).

The debt must be one which would be recoverable but for the Statutes of Limitations. If for some other reason it would not be recoverable the right to pay it is gone. Thus in *Re Rownson*¹ the father of a lady about to marry promised verbally to settle a certain amount upon her. By section 4 of the Statute of Frauds, 1677, this promise, being one made in consideration of marriage, could not be enforced unless it was reduced into writing and signed by the father. The father died more than six years after the promise. It was held that his personal representatives had no right to pay over the sum promised to be settled.

And the statute-barred debt to be payable by the personal representatives must not have been adjudicated irrecoverable. Thus in *Midgley v. Midgley*² a creditor whose debt was statute-barred sued the executors. The

¹ (1885), 29 Ch. D. 358; 23 Digest 366, 4343. See also *Re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66; 23 Digest 441, 5108.

² [1893] 3 Ch. 352; 23 Digest 356, 4248.

court held it was irrecoverable. Afterwards one of the executors wished to pay it. It was held that he had no right so to do.

Paragraph (2).

When an order for administration is made the court will permit statute-barred debts to be paid only when no one interested in the assets objects. And this rule applies when any application is made to the court which could formerly have been made only in an administration action. Thus in *Re Wenham, Hunt v. Wenham*,¹ a summons under Order 55, rule 3 (a), was taken out by personal representatives to determine what was owing to a certain creditor. This creditor's debt was in fact statute-barred. The residuary legatee appeared on the summons and objected to the personal representatives paying the debt. It was held that the objection was good.

It may, perhaps, be added that the executors' affidavit for probate including among the testator's debts one due to the plaintiff is not such an acknowledgment as will prevent the statute running against the plaintiff.² And further, that where the will charges the testator's debts on land the period of limitation of a simple contract debt is, as against the land, not six but twelve years.³

ARTICLE 208.

Retainer of Debts.

(1) A personal representative is entitled to pay to himself out of the assets a debt, due to him personally or to him jointly with another, and even though the debt may be statute-barred, in priority to paying a debt of the same degree due to another creditor.

¹ [1892] 3 Ch. 59; 23 Digest 358, 4259.

² *In re Beavan*, [1912] 1 Ch. 196; 23 Digest 360, 4273.

³ *In re Balls, Trewby v. Balls*, [1909] 1 Ch. 791; 23 Digest 365, 4338.

(2) This right is not lost by an order for administration or by payment of the assets into court or by the appointment of a receiver, in so far as the assets actually came into the possession of the personal representatives before the order.

This right to prefer himself given to a personal representative is not regarded with favour by the court, which never permits it where it can prevent it. Thus where a creditor as creditor obtains a grant of letters of administration the court usually insists that he shall enter into an undertaking not to prefer his own debt.¹

Two reasons have been given for the origin of the right. One is that an executor cannot sue himself; and therefore, under the old law when judgment debts enjoyed priority, if the executor had had no right to retain, any other creditor, by obtaining judgment for his debt, would have been able to gain priority over the executor.² Another explanation is that the personal representative's right of retainer is correlative to his right of preference. A personal representative has, as we shall see,³ a right to prefer one creditor to others in equal degree, and in the same way he may prefer himself by retaining the amount of his debt out of the assets.⁴ But, whatever may be the origin of the right, the courts did not favour it. So it was that, when the deceased died before 1926, the personal representative could retain only out of common law assets.⁵ This, however, was altered by section 34 of the Administration of Estates Act, 1925, and when the death occurs after 1925 the right of retainer is exercisable in respect of all assets.

The personal representative may retain not merely in respect of a debt due at the death of the testator, but

¹ See *In re Belham*, [1901] 2 Ch. 52; 23 Digest 219, 2619.

² *Re Compton, Norton v. Compton* (1885), 30 Ch. D. 15, at p. 19; 23 Digest 374, 4434.

³ *Post*, p. 585.

⁴ *Talbot v. Frere* (1878), 9 Ch. D. 568, at p. 570; 23 Digest 373, 4424.

⁵ *Re Poole, Thompson v. Bennett* (1877), 6 Ch. D. 739; 23 Digest 376, 4452; *Re Baker* (1890), 44 Ch. D. 262, at p. 270; 4 Digest 502, 4523; *Re Williams, Holder v. Williams*, [1904] 1 Ch. 52; 23 Digest 377, 4457.

also a debt accrued since,¹ but not in respect of a contingent liability,² or unliquidated damages.³ He can also retain against statute-barred debts, provided such debts would be recoverable but for the Statutes of Limitations; but he cannot retain in respect of debts which are unenforceable because they are not evidenced by writing as required by the Statute of Frauds.⁴ It was held formerly that a personal representative could retain, not only in respect of a debt due to him personally, but also in respect of a debt due to a trustee for him, provided that he had an absolute, and not merely partial, beneficial interest in the debt.⁵ Now, however, the effect of section 34 of the Administration of Estates Act, 1925,⁶ is that the right can only be exercised in respect of debts owing to the executor in his own right, whether solely or jointly with another.

The right arises out of the possession of the assets by the personal representative. Once the personal representative has obtained possession, his right to retain is not lost by his paying them into court,⁷ or by an order for administration.⁸ It is defeated by an order in bankruptcy in so far as the assets are received by the receiver, but not in respect of assets actually received by the personal representative.⁹ He need not declare his intention to retain until a claim is made by another creditor against the assets.¹⁰ If he does not then plead it or *plene administravit*, he cannot, after the creditor has obtained judgment, set up his right.¹¹ If the debt due to him is larger than the value of the assets, he may retain the assets *in specie*.¹²

¹ *Boyd v. Brookes* (1864), 3 Beav. 7; 23 Digest 377, 4471.

² *In re Beeman*, [1896] 1 Ch. 48; 23 Digest 382, 4525.

³ *Re Compton, Norton v. Compton*, *supra*.

⁴ *Re Rounson, Field v. White* (1885), 29 Ch. D. 358; 23 Digest 366, 4343.

⁵ *Re Hayward, Tweedie v. Hayward*, [1901] 1 Ch. 221; 23 Digest 381, 4518; *Re Sutherland, Duchess of, Michell v. Countess Bubna*, [1914] 2 Ch. 720; 23 Digest 382, 4519. ⁶ 8 Halsbury's Statutes 328.

⁷ *Pulman v. Meadows*, [1901] 1 Ch. 233; 23 Digest 375, 4436.

⁸ *Re Belham*, [1901] 2 Ch. 52; 23 Digest 219, 2619.

⁹ *In re Wells* (1890), 45 Ch. D. 569; 23 Digest 377, 4463.

¹⁰ *Re Rhoades*, [1899] 2 Q. B. 347; 23 Digest 374, 4429.

¹¹ *In re Marvin*, [1905] 2 Ch. 490; 23 Digest 383, 4543.

¹² *In re Gilbert*, [1898] 1 Q. B. 282; 23 Digest 374, 4433.

On the other hand, a personal representative can only retain as against creditors of equal degree. Until recently this point was doubtful. In the case of *In re Ambler*¹ it was held that a widow administering the insolvent estate of her deceased husband could retain in respect of money lent to him for the purpose of his trade or business, although (as we have seen)² such a debt is a deferred debt. The ground of this decision was that section 10 of the Judicature Act, 1875, which imported into the administration of an insolvent estate the bankruptcy rules as to debts and liabilities provable, did not prevent the retainer of a deferred debt. We have seen, however,³ that, when the death occurs after 1925, the Administration of Estates Act of that year expressly imports also into the administration of an insolvent estate the bankruptcy rules as to priorities; and it is now settled that a deferred debt cannot be detained to the prejudice of ordinary creditors.⁴

ARTICLE 209.

Right to Prefer Debts.

(1) Personal representatives are entitled to pay out of assets the debt, even though statute-barred, due to one creditor of the deceased in preference or priority to a debt of the same degree due to another creditor.

(2) This right is lost upon an order for administration being made or upon a creditor obtaining judgment against the personal representatives for his debt.

Paragraphs (1) and (2).

“ The right of an executor to prefer one creditor and the right to retain his own debt are in many respects the

¹ [1905] 1 Ch. 697; 23 Digest 379, 4485.

² *Ante*, p. 579.

³ *Ante*, p. 578.

⁴ *A. G. v. Jackson*, [1932] A. C. 365; Digest Supp.

same thing in substance and in principle, though no doubt the latter can, while the former cannot, be exercised after an administration order." ¹

If the deceased died before 1926, the right could be exercised only out of his common law assets; ² but, with regard to the estates of persons dying after 1925, section 34 of the Administration of Estates Act, 1925, ³ makes it exercisable out of all his assets.

Even when the executor has notice that an administration action has been commenced he can prefer until judgment for administration is given. ⁴ An executor may pay a non-interest-bearing debt before an interest-bearing debt of the same degree. ⁵ And he can pay debts out of his own money and subsequently prefer his own debt so arising to that of other creditors. ⁶

ARTICLE 210.

Right to retain Legacy against a Legatee's Debt.

Where a legacy of money is bequeathed to a person who is indebted to the testator's estate or who is under a liability to the testator's estate which may ripen into a debt, the executor may retain for the benefit of the estate so much of the legacy as may be necessary to discharge the debt or secure the liability.

This right to retain against a legatee's debt or liability applies only to legacies of money. Thus legacies of shares, ⁷ or leaseholds and devises of freeholds are not

¹ *Per* NORTH, J., *In re Hankey, Cunliffe Smith v. Hankey*, [1899] 1 Ch. 541; 23 Digest 354, 4220.

² *Re Williams*, [1904] 1 Ch. 52; 23 Digest 377, 4457.

³ 8 Halsbury's Statutes 328.

⁴ *Vibart v. Coles* (1890), 24 Q. B. D. 364; 23 Digest 367, 4362.

⁵ *Robinson v. Cumming* (1742), 2 Atk. 409; 25 Digest 525, 174.

⁶ *In re Jones*, [1914] 1 Ch. 742; 23 Digest 367, 4353.

⁷ *In re Savage*, [1918] 2 Ch. 146; 23 Digest 370, 4395.

within it.¹ It applies, like the personal representative's right of retainer, to statute-barred debts,² and as against the legatee's assignee,³ and his trustee in bankruptcy,⁴ unless in the latter case the executor proves in the bankruptcy for the whole debt.⁵

But it does not apply where the legatee was never under any legal obligation to the testator, although he had funds in his possession which, apart from the Statute of Limitations, the executor would have been entitled to follow;⁶ nor where the debt owed by the legatee is owed by him as a member of a partnership;⁷ nor can it be relied on where the debt is a debt payable only by instalments;⁸ nor where the executor has accepted a dividend on it on the legatee's bankruptcy.⁹

ARTICLE 211.

Creditors' Right to follow Assets.

A creditor whose debt has not been paid when the assets of a deceased person are distributed among the beneficiaries or are given away by the personal representative, is entitled to follow such assets into the beneficiaries' or donees' hands, even where, in the former case, the personal representative has made the distribution by the order of the court. But this right

¹ *Ex parte Barff* (1849), De G. 613; 4 Digest 417, 3767.

² *Courtenay v. Williams* (1844), 3 Hare 539; 23 Digest 440, 5101.

³ *Re Knapman* (1881), 18 Ch. D. 300; 23 Digest 438, 5077.

⁴ *Re Watson*, [1896] 1 Ch. 925; 23 Digest 438, 5081.

⁵ *Re Binns*, [1896] 2 Ch. 584; 4 Digest 418, 3774. See also *In re Melton*, [1918] 1 Ch. 37; 4 Digest 418, 3776.

⁶ *In re Bruce*, [1908] 2 Ch. 682; 23 Digest 441, 5106.

⁷ *Turner v. Turner*, [1911] 1 Ch. 716; 23 Digest 438, 5079.

⁸ *In re Abrahams*, [1908] 2 Ch. 69; 23 Digest 439, 5083.

⁹ *In re Sewell, White v. Sewell*, [1909] 1 Ch. 806; 23 Digest 446, 5168.

may be lost by acquiescence or delay on the part of the creditor or by the sale of the asset by the beneficiary or donee to a *bonâ fide* purchaser for value without notice that the deceased's debts were not completely discharged.

Like the right of a *cestui que trust* to follow trust funds, the right of a creditor to follow assets continues until the assets have been sold to a purchaser for value without notice. This is the case no matter whether the assets were paid away to the legatees or were given away by the personal representative, and no matter whether the executor paid the assets away of his own motion or by direction of the court.¹ But as the right to follow assets is one given not by the common law but only by equity,² an equitable defence is allowed. Therefore delay or acquiescence on the creditor's part may bar his right,³ as does a sale of the assets to a purchaser for value without notice.

This right of following the assets is recognised and defined by section 38 of the Administration of Estates Act, 1925, which enacts:

(1) An assent or conveyance by a personal representative to a person *other than a purchaser* does not prejudice the rights of any person to follow the property to which the assent or conveyance relates, or any property representing the same, into the hands of the person in whom it is vested by the assent or conveyance, or of any other person (*not being a purchaser*) who may have received the same or in whom it may be vested.

(2) Notwithstanding any such assent or conveyance the court may, on the application of any creditor or other person interested—

(a) Order a sale, exchange, mortgage, charge, lease, payment, transfer or other transaction to be

¹ *David v. Frowd* (1833), 1 My. & K. 200; 24 Digest 793, 8240.

² *Russell v. Plaice* (1854), 18 Beav. 21; 24 Digest 569, 6073.

³ *Blake v. Gale* (1886), 32 Ch. D. 571; 23 Digest 433, 5040. See also *Re Brogden* (1888), 38 Ch. D. 546; 23 Digest 322, 3889.

carried out which the court considers requisite for the purpose of giving effect to the rights of the persons interested ;

- (b) Declare that the person, *not being a purchaser*, in whom the property is vested is a trustee for those purposes ;
- (c) Give directions respecting the preparation and execution of any conveyance or other instrument or as to any other matter required for giving effect to the order ;
- (d) Make any vesting order, or appoint any person to convey in accordance with the provisions of the Trustee Act, 1925.

ARTICLE 212.

Creditors' Right to *Donationes Mortis Causâ*.

In case the assets prove insufficient for the payment of the deceased's debts and liabilities in full the creditors are entitled to resort to property which the deceased during his life gave away as *donationes mortis causâ*.

By *donatio mortis causâ* is meant a gift of pure personalty made by the deceased, either personally or by an agent acting in his presence, and completed by delivery to the donee. The gift may be of the property itself or of the means of obtaining possession of the property or of the documents of title to the property. It must have been made when the donor was in expectation of dissolution, and be conditioned to be void in case of his recovery, and to be

absolute in case of his death as he expected when he made the gift.

It has been already pointed out that though a deceased person's *donationes mortis causa* are liable on deficiency of assets for the payment of his debts, yet they form no part of his assets. This is because they operate not from his death but from their delivery during his life to the donee.¹

¹ *Solicitor to the Treasury v. Lewis*, [1900] 2 Ch. 812; 23 Digest 552, 371.

BOOK II (C).

Section II. Administration of Assets.

CHAPTER 4.

DISTRIBUTION OF ASSETS.

SUMMARY.

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ARTICLE 213.

Notice by Advertisement to Creditors.

Where personal representatives give such notice by advertisement in the Gazette and in a newspaper (when the estate is in land) circulating in the district where the land is situated, and such other like notices as would, in any special case, have been directed by the court in an administration action, to creditors and others to send in their claims against the assets, the personal representatives, after the expiration of the time fixed in such notice for sending in claims, not being less than three months, may distribute the assets among those entitled to them, without incurring any personal liability

before distributing the assets among the beneficiaries—

- (1) Where being liable as such for any rent, covenant, or agreement contained in a lease or an agreement for a lease granted or assigned to their testator or intestate, or any rent, covenant or agreement payable under or contained in any grant made in consideration of a rentcharge, or any indemnity given in respect of any such rent, covenant or agreement as aforesaid, they satisfy all liabilities under the lease or grant which may have accrued, or been claimed, and set apart, where necessary, a sufficient amount of assets to satisfy any covenant to expend a definite sum of money on the property demised and then assign the lease or agreement to a purchaser;
- (2) Where being liable as such to any other future or contingent liability, they set apart an amount of assets reasonably sufficient to meet it or obtain an order of administration under which they are directed to distribute the assets among the beneficiaries without setting apart such amount of assets.

Paragraph (1).

This power is conferred by section 26 of the Trustee Act, 1925,¹ as amended by the Law of Property (Amendment) Act, 1926; and it may also be exercised by trustees. It can be exercised only when there is privity between the personal representatives and the lessor. Thus where a

¹ 20 Halsbury's Statutes 117.

testator had held leaseholds subject to onerous covenants but had assigned them before his death, the executors were not entitled to set apart assets against any liability which might arise.¹ The word "purchaser" under these sections means a person who buys the property and pays a price for it; and accordingly where a transferee receives payment for taking it and the burden of the covenants over, there is no sale of the property within them.²

This enactment does not in any way prejudice the right of landlords in case of breach of covenant to follow the assets if necessary into the hands of the beneficiaries; but it applies notwithstanding anything to the contrary contained in the will of the testator.

Paragraph (2).

It is not the custom of the court to retain funds for the purpose of meeting contingent liabilities, but personal representatives must do so to escape liability for devastavit in case such liabilities become actual in the future. An order of administration, however, will protect them.³ If, however, the contingent liability does not become absolute within six years after the personal representatives have distributed the assets it will be barred as against them personally.⁴

ARTICLE 215.

Kinds of Legacies.

(1) A *legacy* is a gift by will of personal estate; a *devise* is a gift by will of real estate.

(2) Legacies are either *specific* or *general*. They are specific when the estate given is

¹ *In re Nixon, Gray v. Bell*, [1904] 1 Ch. 638; 24 Digest 608, 6384.

² *In re Lawley, Jackson v. Leighton*, [1911] 2 Ch. 530, at p. 533; 24 Digest 608, 6397.

³ *In re King*, [1907] 1 Ch. 72; 24 Digest 608, 6385.

⁴ *Lacons v. Wormill*, [1907] 2 K. B. 350; 24 Digest 671, 6985; *In re Blow*, [1914] 1 Ch. 233; 24 Digest 672, 6988.

specifically identified; they are general when the estate given is not specifically identified. When a general legacy is of money payable out of the general estate it is called a *pecuniary* legacy. When it is of money payable out of specifically identified estate it is called a *demonstrative* legacy; when it is of the remainder of the personal estate after payment of the testator's debts and satisfaction of the other legacies, it is called a *residuary* legacy.

(3) A specific legacy is *adeemed* (or defeated) so far as the testator disposed of the specific estate included in it during his life; a general legacy is not liable to ademption in this way.

(4) Similarly there may be a specific, a residuary or a general devise; and a specific devise is liable to be adeemed in the same way as a specific legacy.

Paragraph (2).

As ordinary examples of the different kinds of legacies the following may be given: "My gold watch to A.," a specific legacy; "£1,000 to B.," a general pecuniary legacy; "£1,000 out of the proceeds of the sale of my Midland Stock to C.," a general demonstrative legacy; "all the rest of my personal estate to D.," a general residuary legacy. But a sum of money may be a specific legacy if it is specifically identified. Thus, "I leave to X. the £1,000 owed by X. to me," is a specific legacy.¹ And a specific part of a residuary bequest may also be so,² and so may a gift generally described, as "all my stock in the Midland Railway," even though that will include not merely the stock the testator had at the time he made his will, but any subsequently bought by him.³ On the other

¹ *In re Wedmore*, [1907] 2 Ch. 277; 23 Digest 388, 4584.

² *In re Maddock*, [1902] 2 Ch. 220; 23 Digest 523, 5904.

³ *In re Slater*, [1907] 1 Ch. 665; 44 Digest 405, 2378.

hand, what is in effect a legacy of specific property may be a general legacy. Thus, a gift of "£1,000 in Midland Railway Stock" is a general legacy even though at the time the testator made his will he had just £1,000 Midland Railway Stock.¹ If the gift had been of "*my* £1,000 Midland Railway Stock" the gift would have been specific.

Paragraph (3).

This division of legacies is made for two purposes. The first is in connection with their liability to be defeated. If a testator before his death disposes of an article which he has specifically bequeathed, that bequest is adeemed or cut out of his will, there being nothing among his assets at his death on which it can operate.² But general or demonstrative legacies are not liable to be defeated in this way. A general legacy is not adeemable since it is the bequest of nothing except a payment out of the assets, and so is payable as long as there are assets to pay it. A demonstrative legacy is not adeemed by the disposal of the property out of which it is to be paid during the testator's life: after such disposal it ranks simply as a general legacy.³

The second purpose for which this division of legacies is made is in connection with what is called abatement, that is, the reduction or defeat of legacies when there are not sufficient assets to pay both them and the testator's debts and liabilities in full. This is dealt with in the next Article.

Paragraph (4).

Formerly there was no division of devises into specific and general devises. A gift by will of real estate, no matter in what terms it was described, was always specific. Thus a residuary devise—"all the rest of my freeholds I devise to B."—was treated as a specific devise of all the free-

¹ *Sibley v. Perry* (1802), 7 Ves. 523; 44 Digest 532, 3487.

² *In re Slater*, [1907] 1 Ch. 665; 44 Digest 405, 2378.

³ As to residuary legacies, see *In re Walker*, [1921] 2 Ch. 63; 44 Digest 404, 2358.

holds not otherwise disposed of.¹ But now, for the purpose of prior liability to payment of a testator's debts, a residuary devise ranks with a residuary bequest.²

ARTICLE 216.

Order of Distribution of a Testator's Estate.

When a person dies solvent leaving a will, so soon as his executor has paid all the debts and discharged or provided for all the liabilities, his duty is to transfer the personalty and realty remaining to the persons by law entitled to it respectively. In order to ascertain who these persons are he is bound to "marshal" the deceased's assets, that is, to hold that as between the beneficiaries the debts and liabilities have been paid out of the assets in the following order :

- (i) Property undisposed of by the will.
- (ii) Property not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift.
- (iii) Property specifically appropriated by the will for the payment of debts.
- (iv) Property charged with or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.
- (v) The fund reserved for the payment (if any) of pecuniary legacies.

¹ *Lancefield v. Iggulden* (1874), L. R. 10 Ch. 136 ; 44 Digest 395, 2279.

² *Infra*, Art. 216.

- (vi) Property specifically devised or bequeathed rateably according to value.
- (vii) Property appointed by will under a general power, including the statutory power to dispose of entailed interests rateably and according to value.

It is to be noted that the order of liability stated in this Article obtains only as between the beneficiaries themselves. A creditor who obtains judgment against an executor or administrator is entitled to resort to any part of the estate to satisfy the judgment debt. If he seizes, for example, property specifically bequeathed, then the legatee to whom it is bequeathed is entitled to be compensated at the expense of all those entitled to any of the property ranking after, and therefore liable before, specific legacies. And also it applies only in so far as the testator does not indicate an intention to the contrary. Thus a direction in the will that certain legacies shall be first paid in full gives such legacies priority over all others.¹

The order of liability stated above is applicable in all cases where the testator died after 1925. In cases where the death occurred before 1926, the order was different, and for details of it the student is referred to earlier editions of this work. It may be mentioned here, however, that the broad feature of the former order was that primary liability for the payment of debts and liabilities fell on the general or residuary personal estate. The testator, however, could negative that primary liability by a contrary intention expressed or implied in his will. In order to negative it, however, it was not enough that he charged realty with payment of his debts or even gave realty on trust for the payment of his debts; it was essential that the residuary personalty should be specifically exonerated.²

The new order is contained in Part II of the First

¹ *Re Hardy* (1881), 17 Ch. D. 798; 23 Digest 418, 4894.

² *Powell v. Riley* (1871), L. R. 12 Eq. 175; 44 Digest 745, 6027; *Re Banks, Banks v. Busbridge*, [1905] 1 Ch. 547; 23 Digest 502, 5682.

Schedule to the Administration of Estates Act, 1925¹; and its most important feature is that it places realty and personalty on an equal footing as regards liability to debts. One peculiarity of the new order is that property specifically appropriated or devised or bequeathed for the payment of debts comes third in the order of liability. As we have seen, when the general or residuary personalty was the fund primarily liable, the mere fact that debts were charged on realty was not sufficient in itself to exonerate the personalty; there must be a specific exoneration of the personalty. In other words, a charge of debts on realty alone made the realty merely a secondary fund. The reasons for that were historical, but it might have been expected that, when realty and personalty were placed on an equal footing as regards liability, property specifically appropriated or devised or bequeathed for the payment of debts should be primarily applicable for that purpose. To have done so would have been to meet the presumed wishes of most testators; but the legislature has seen fit to provide otherwise.

When considering the property which comes fourth in the order of liability—namely, property charged with, or devised or bequeathed subject to a charge for, the payment of debts—the reader would be well advised to distinguish carefully between property which is charged with the payment of debts, or becomes subject to such a charge, by virtue of the will itself, and property which is already subject to such a charge before the will comes into operation. A simple example may be used by way of illustration. A testator may own, for instance, a freehold farm which (for the sake of illustration) is free from incumbrances, and by his will he may charge it with, or devise it subject to a charge for, the payment of his debts. In that case the farm must be placed with the property which comes fourth in order of liability. But, on the other hand, he may mortgage his farm in his lifetime, and then may devise it by his will. In such a case, although the devisee takes the farm subject to the mortgage, the farm is not property devised subject to a

¹ 8 Halsbury's Statutes 363.

charge for the payment of debts ; the charge, or mortgage, is not created by the will but by an independent act which came into operation before the operation of the will ; and special provision for it is made by section 35 of the Administration of Estates Act, 1925.¹ That section provides as follows :—

Where a person dies possessed of, or entitled to, or under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge (including a lien for unpaid purchase money), and the deceased has not by will, deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge, and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

Formerly, when the rule was that residuary personalty (together with personalty not disposed of by the will at all) was primarily liable for the payment of the testator's debts as between the beneficiaries under his will, the rule was varied so far that if the testator had mortgaged freeholds or chattels real or had contracted to purchase them but had not paid the purchase money, the heir, devisee or legatee who took such property was entitled to have the mortgage debt, or the purchase money, paid out of the general residuary personalty unless (in the case of a mortgage debt) the mortgage was "ancestral," that is, a mortgage debt which had not been contracted by the deceased but one to which the property was subject when he succeeded to it. The position was changed, however, by the Real Estate Charges Acts, 1854, 1867 and 1877. The material provisions of those Acts are now re-enacted by the section quoted above, with, however, an important

¹ 8 Halsbury's Statutes 330.

modification ; namely, that whereas those Acts did not apply to pure personalty the section now under consideration applies to all kinds of property.

But two points arising from that section should be noticed. In the first place, it only applies "as between the different persons claiming through the deceased," and it is expressly provided that "nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise." In the second place, the section contemplates that the deceased might "by will, deed or other document" signify "a contrary or other intention." So the problem arises, by what words "a contrary or other intention" may be signified. Towards the solution of that problem the section affords some assistance ; for it provides that :—

Such contrary or other intention shall not be deemed to be signified :—

- (a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate ; or
- (b) by a charge of debts upon any such estate, unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

It follows from this that the direction to exonerate the property charged must be specific, though it need not necessarily be express. Thus a direction that the devisees of some mortgaged properties shall take them subject to the mortgage debts will be a sufficient indication that the devisees of other mortgaged properties, as to which there is no such direction, shall take them free from debt.¹ All that is necessary is that the debts in question should in some way be specifically identified.²

The Act, however, does not interfere with a mortgagee's right to sue the personal representatives on the deceased's

¹ *In re Valpy*, [1906] 1 Ch. 531 ; 23 Digest 490, 5584.

² *In re Valpy*, *supra* ; *Re Fleck, Colston v. Roberts* (1888), 37 Ch. D. 677 ; 23 Digest 491, 5592.

covenant. When he does so the legatees have a lien on the property charged so far as other property available to them has been taken away by payment of the mortgage debt.¹

In the article it is stated that an executor, when he has paid all the debts and discharged or provided for all the liabilities, must transfer the personalty and realty to the persons by law entitled to it respectively. That means, normally, the persons to whom it has been bequeathed or, as the case may be, devised by the will. After 12th July, 1939, however, the provisions of the will may be modified by an order made under the Inheritance (Family Provision) Act, 1938.² That Act gives to certain persons, therein called "dependants," power to apply to the Court to vary what the Roman jurists would have described as an "undutiful will." Dependants, for the purposes of the Act, are the following relatives of the deceased testator :—

- (a) a wife or husband ;
- (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself ;
- (c) an infant son ; or
- (d) a son who is, by reason of some mental or physical disability, incapable of maintaining himself.

Within six months after the date on which representation in regard to the testator's estate for general purposes is first taken out, application may be made to the Court, by or on behalf of any dependant as above defined, and, if the Court is of opinion that the will does not make reasonable provision for the maintenance of that dependant, the Court may order that such reasonable provision as the Court thinks fit shall, subject to such conditions or restrictions, if any, as the Court may impose, be made out of the testator's net estate for the maintenance of that dependant. This provision is subject to the proviso that no application shall be made on behalf of

¹ *Webb v. Smith* (1885), 30 Ch. D. 192 ; 35 Digest 600, 3401.

² 31 Halsbury's Statutes 149.

any person in any case where the testator has bequeathed not less than two-thirds of the income of the net estate to a surviving spouse and the only other dependant or dependants, if any, is or are a child or children of the surviving spouse.

Subject to that proviso, however, the Court may order reasonable provision to be made for the maintenance of the dependant; but the Court is directed to take into account the financial position, actual or prospective, of the dependant concerned and also to have regard to the conduct of that dependant in relation to the testator and otherwise, and to any other matter or thing which in the circumstances of the case the Court may consider relevant or material in relation to that dependant, to the beneficiaries under the will, or otherwise. The Court must also have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for a dependant; and the Court may accept such evidence of these reasons as it considers sufficient, including any written statement signed by the testator and dated.

If the Court decides to make an order for maintenance, it has a very wide discretion in framing it; but, except in cases where the net value of the estate does not exceed £2,000, the order must provide for maintenance by periodic payments of income. Moreover, the order must provide for the termination of those periodic payments not later than :—

- (a) in the case of a wife or husband, her or his re-marriage;
- (b) in the case of a daughter who has not been married, or who is under disability, her marriage or the cesser of her disability, whichever is the later;
- (c) in the case of an infant son, his attaining the age of twenty-one years;
- (d) in the case of a son under disability, the cesser of his disability;

or, in any case, his or her earlier death.

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If the Court decides to make an order for maintenance, it has a very wide discretion in framing it; but, except in cases where the net value of the estate does not exceed £2,000, the order must provide for maintenance by periodic payments of income. Moreover, the order must provide for the termination of those periodic payments not later than:—

- (a) in the case of a wife or husband, her or his remarriage;
- (b) in the case of a daughter who has not been married, or who is under disability, her marriage or the cesser of her disability, whichever is the later;
- (c) in the case of an infant son, his attaining the age of twenty-one years;
- (d) in the case of a son under disability, the cesser of his disability;

or, in any case, his or her earlier death.

There is also a maximum limit to the amount of annual

income which may be made applicable for the maintenance of a testator's dependants by any order or orders in force at the same time. If the testator leaves a surviving spouse and one or more other dependants, it must not be more than two-thirds of the annual value of the net estate; and, if he does not leave a surviving spouse, or leaves a surviving spouse but no other dependant, it must not be more than one-half.

Any order made under the Act will take effect as a variation of the will; a memorandum of it will be indorsed on, or permanently annexed to, the probate or, as the case may be, the letters of administration with the will annexed; and an office copy of the order will be sent to the Principal Probate Registry for entry and filing.

ARTICLE 217.

Order of Distribution of an Intestate's Estate.

(1) When a person died intestate before 1926 and letters of administration were granted, it was the duty of his administrator to pay his liabilities, applying all the personal estate for that purpose before applying any of the real estate, and he could apply the real estate to the payment of the intestate's debts only subject to the intestate's widow's right to dower out of it. So soon as the debts were paid, he must pay the widow (if any) if the intestate had died childless, £500, raised rateably out of the personal and real estate and then distribute the personalty among the widow (if any) and the next of kin of the deceased according to the Statutes of Distributions, and convey the real estate subject to the widow's right to dower to the heir.

(2) Where a testator died partially intestate and without next of kin, then in the absence of

any indication to the contrary, his executors were as against the Crown entitled to his undisposed of personalty.

(3) Now, on the death of a property owner intestate all his real and personal property is equally liable for his debts which are to be paid *pari passu* out of a joint fund to arise from the sale of his realty and the conversion of his personalty. The widow's right of dower is abolished and a first charge is made on the joint fund after his debts have been paid of £1,000, free of death duties, whether the deceased left children him surviving or not. The personal representatives are then to distribute the residue of the joint fund among the widow and the statutory next of kin subject to this that no infant next of kin shall take an indefeasible share of the residue until he or she attains twenty-one or marries under that age. Until then the share of such infant is to be held in trust for him or her by the administrators or by trustees appointed for this purpose. The common law heir of the intestate has no claim to any share of the realty, but if he takes any interest in any part of the intestate's estate it must be as one of the next of kin.

(4) Where there is no next of kin any residue in case of a deceased person fully intestate after payment of his debts and in case of a deceased person partially intestate after payment of his debts and legacies goes to the Crown as *bona vacantia*, unless it appears from the will that the testator intended the executors to take.

Paragraph (1).

On intestacy the personal estate of the deceased was primarily liable for his debts, subject to the provisions of

the Land Charges Acts, 1854 to 1877,¹ which applied to cases of intestacy as well as where the deceased left a will.

The £500 payable to the widow of a childless intestate was a charge on the deceased's realty and personalty created by the Intestates' Estates Act, 1890. It was a first charge and was payable rateably out of his net realty and personalty,² and was in addition to her right to a half share of the personalty and to dower out of the realty. The Act did not apply where there was only a partial intestacy, but it did apply where the deceased made a will, if such will had no effect owing to all the beneficiaries predeceasing the testator.³

Paragraph (2).

Formerly the executors were entitled to the undisposed of personalty even as against the testator's next of kin, but this was altered by the Executors Act, 1830. That Act did not affect their claim as against the Crown when the testator left no next of kin unless the testator indicated in his will that he did not intend the executors to benefit. Such an indication was inferred from his leaving them as executors equal legacies but not from his leaving them unequal legacies.⁴

Paragraph (3).

Under the new law realty and personalty are made a joint fund for the payment of debts and for distribution among the statutory next of kin of the intestate. On the death of an owner of realty and personalty intestate his realty and personalty vest in the judge of the Court of Probate. On the appointment of an administrator the whole estate vests in him, the realty on a trust for sale, the personalty on a trust to call in and convert to money, with power to postpone such sale and conversion as the administrator may think fit.⁵ (This rule applies to cases of partial intestacy when the executors of the will are in

¹ Now Administration of Estates Act, 1925, sect. 35; 8 Halsbury's Statutes 330.

² *In re Heath*, [1907] 2 Ch. 270; 18 Digest 21, 200.

³ *In re Cuffe*, [1908] 2 Ch. 500; 18 Digest 21, 198.

⁴ *Attorney-General v. Jeffreys*, [1908] A. C. 411; 23 Digest 472, 5411.

⁵ Administration of Estates Act, 1925, sect. 33; 8 Halsbury's Statutes 324.

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⁴ *Attorney-General v. Jeffreys*, [1908] A. C. 411; 23 Digest 472, 5411.

⁵ Administration of Estates Act, 1925, sect. 33; 8 Halsbury's Statutes 324.

the same position as the administrators in case of complete intestacy.) Out of this fund the debts are to be paid without distinction as to whether the fund arises from the sale of realty or the conversion of personal investments. Hereditary succession is abolished and, except in a few special cases (as, for instance, where an heir in tail succeeds on an intestacy), any claim the common law heir can have to a share of the intestate's estate must be as one of his statutory next of kin. Estates by the curtesy in a deceased wife's estate are also abolished and so is escheat to the Crown or the Duchy of Lancaster or the Duke of Cornwall or to any mesne lord.¹

Paragraph (4).

The Executors Act is repealed by the Administration of Estates Act, 1925, Second Schedule, and so all undisposed of residue of the estate of a testator who dies without next of kin will go to the Crown as *bona vacantia*. "Intestate" in the Administration of Estates Act, 1925, includes not merely a person who dies without a valid will but one who dies leaving a will which does not dispose of his whole estate so far as the estate is not disposed of by the will.²

The case of partial intestacy, however, differs from complete intestacy in one respect: Where there are issue of the testator taking interests under the will they must bring these into hotchpot when the undisposed of assets are distributed.

Where there are no issue it now lies on the executors who claim the undisposed of estate to show that the testator intended them to take. Formerly it lay on the Crown to show they were not intended to take.

ARTICLE 218.

Rights of Legatees to follow Assets.

(1) Where the assets are insufficient, after the payment of the debts, to pay the legacies in full, then a legatee whose legacy was liable to

¹ Administration of Estates Act, 1925, sect. 45; 8 Halsbury's Statutes 345.

² *Ibid.*, sect. 55 (vi); 8 Halsbury's Statutes 357.

abate but has been paid in full must return to the other legatees the amount by which it should abate.

(2) Where a pecuniary legacy is postponed and the executors set apart and invest a portion of the assets to meet it and distribute the rest, then, if when the time for payment arrives the investments are not in value equal to the amount of the legacy, the legatee is entitled to recover the difference from the residuary legatee.

(3) Any legatee whose legacy has not been paid in full is entitled, in common with all beneficiaries under trusts, to follow the assets into the hands of the personal representatives or any persons claiming through them otherwise than by purchase for value.

Paragraph (1).

This right to follow assets paid away to co-legatees arises only where the assets are *ab initio* insufficient to pay all the legatees in full. When the assets were sufficient to do so at the time the co-legatees were paid, and the subsequent deficiency arose through the default of the executor,¹ no such right exists.¹

Paragraph (2).

A legacy was given to a person contingently on his attaining a certain age. No interest was given in the meantime. The executor set aside what he thought would be sufficient to pay the legacy at the time of payment. He invested this sum. The securities depreciated, and when the legatee reached the age in question the securities were not sufficient to realise the amount of the legacy.

¹ *Fenwick v. Clarke* (1862), 4 De G. F. & J. 240; 23 Digest 329, 3927. *Re Winslow* (1890), 45 Ch. D. 249; 23 Digest 431, 5026.

It was held that the legatee was entitled to have that amount made up by the residuary legatee, and that the executor, having acted reasonably, was not personally liable.¹

Paragraph (3).

This right is now recognised by section 38 of the Administration of Estates Act, 1925,² which enacts that "an assent or conveyance by a personal representative to a person other than a purchaser does not prejudice the rights of any person to follow the property to which the assent or conveyance relates, or any property representing the same, into the hands of the person in whom it is vested by the assent or conveyance, or of any other person (not being a purchaser) who may have received the same or in whom it may be vested." But this provision must be read in conjunction with section 32 of the same Act which enacts that "if any person to whom any such beneficial interest devolves or is given, or in whom any such interest vests, disposes thereof in good faith before an action is brought or process is sued out against him, he shall be personally liable for the value of the interest so disposed of by him, but that interest shall not be liable to be taken in execution in the action or under the process."

ARTICLE 219.

Payment of Interest or Income upon Legacies.

An immediate or contingent specific or residuary devise or an immediate or contingent specific legacy carries with it all income accruing upon the property devised or bequeathed from the death of the testator, and it must

¹ *Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226; 23 Digest 402, 4731.

² 8 Halsbury's Statutes 337.

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² 8 Halsbury's Statutes 337.

bear all the expenses reasonably incurred by the executors in preserving it till their assent to it can be given.

An immediate general or demonstrative legacy carries no income or interest till the end of a year after the testator's death. If it is then still unpaid, the legatee is entitled to interest at the rate of 4 per cent. upon it from that time until payment, even though being a demonstrative legacy it is made payable out of a reversionary fund.

The year following the death is called the "executor's year." It is the period allowed to him to administer the assets, during which the legatees have no right *prima facie* to claim payment of their legacies. If, however, the executor has in fact got in and realised all the assets and paid all the debts, it is his duty to pay the legacies whether the year has expired or not.

But this is subject, of course, to the provisions of the will. Thus if the will contains a direction to pay the legacy at a certain time, interest runs from that time, or to pay it out of a reversionary fund, interest runs from the time the fund falls into possession.¹

In *In re Pearce*,² the testator left certain large residences with their furniture, horses, carriages, etc., to a devisee. The executors, while winding up the estate, incurred certain expenses through keeping a number of servants to preserve and care for these residences and chattels. It was held that these must be paid not out of the residuary estate but by the devisee.³

General and demonstrative legacies do not carry interest in the absence of express direction until the end of the executor's year, but then in the absence of express direction they do bear it, even when in the case of demon-

¹ *In re Gyles*, [1907] 1 I. R. 65; cf. *In re Yates* (1907), 96 L. T. 758; 23 Digest 407, 4776.

² [1909] 1 Ch. 819; 23 Digest 476, 5447.

³ See also *Re Rooke*, [1933] Ch. 970; Digest Supp.

strative legacies they are made payable out of a fund which has not at the end of the year vested in possession.¹

Formerly interest on a contingent specific bequest went not to the specific legatee but to the residuary legatee, or persons entitled on intestacy, unless the will clearly indicated an intention to the contrary.² But now, in the case of wills coming into operation since 1925, it is provided that "a contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall . . . carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of."³

¹ *Walford v. Walford*, [1912] A. C. 658; 23 Digest 388, 4588. *In re Palfreeman*, [1914] 1 Ch. 877; 23 Digest 414, 4848.

² *Guthrie v. Walrand* (1883), 22 Ch. D. 572; 23 Digest 411, 4812. *Re Inman*, [1893] 3 Ch. 518; 23 Digest 410, 4810.

³ Law of Property Act, 1925, sect. 175; 15 Halsbury's Statutes 357.

BOOK II (C).

Section II. Administration of Assets.

CHAPTER 5.

THE LIABILITY OF PERSONAL
REPRESENTATIVES.

SUMMARY.

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ARTICLE 220.

Actions against Personal Representatives.

(1) An action for the administration of the assets of a deceased person by the Chancery Division (as relief against executors or administrators) may be brought—

- (i) By any creditor whose debt is actually due.
- (ii) Where the deceased left a will by any legatee or devisee whose interest under the will is not merely expectant.
- (iii) Where the deceased died wholly or partly intestate by any of the persons entitled on intestacy.

(2) When such an action is brought the personal representatives may—

- (i) Pay the debt or legacy (if specific or pecuniary) with costs, when the action will be dismissed.
- (ii) Admit assets, when judgment for the debt or legacy (if specific or pecuniary) will be given.
- (iii) Contest the plaintiff's right to judgment for administration, when the court will grant such judgment only if it appears such a course is desirable.
- (iv) Submit to a judgment for administration.

(3) Upon an application to the Chancery Division the court may—

- (i) Order that the application shall stand over for a certain time and that meanwhile the personal representatives shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings.
- (ii) When necessary to prevent proceedings by other creditors or by persons beneficially interested, make the usual judgment or order for administration with a proviso that no proceedings are to be taken under such judgment or order without leave of the judge in person.

Formerly the administration of the estates of deceased persons lay within the jurisdiction of the Ecclesiastical Courts. The Court of Chancery early acquired concurrent jurisdiction which Lord HARDWICKE rendered

practically exclusive by restraining proceedings before an Ecclesiastical Court where there were pending proceedings in Chancery. By the end of the eighteenth century the jurisdiction of Ecclesiastical Courts as to administration had become obsolete, though it continued as to probate and letters of administration till the passing of the Court of Probate Act, 1857, which abolished the jurisdiction as to these matters of "all ecclesiastical, royal peculiar, peculiar, manorial and other courts and persons in England," and vested it in the Court of Probate, now merged in the Probate, Divorce, and Admiralty Division of the High Court of Justice.

Under the jurisdiction of the Court of Chancery, the liability of personal representatives and the nature of the relief given against them have been closely approximated to those of trustees.

ARTICLE 221.

Liabilities similar to those of Trustees.

(1) Generally the liabilities of executors who have taken probate and of administrators are those of other trustees, that is :

- (i) They are chargeable only with assets which they have actually received or which they might have received but for their own wilful default.
- (ii) Once they are chargeable with assets they can discharge themselves only by showing that they disposed of the same in regular course of administration, subject to this—
 - (a) that in an action against executors to recover a legacy they can after twelve years plead section 8 of the Real Property Limitation Act, 1874,¹

¹ 10 Halsbury's Statutes 445. After June, 1940, Limitation Act, 1939, sect. 20.

although they have not disposed of the same in due course of administration ;

- (b) in an action of devastavit they can, when six years have elapsed since the devastavit, plead section 3 of the Statute of Limitations, 1623.¹

(2) The rights to consult the court and to claim a discharge on completion of their duties given to trustees are given equally to personal representatives.

(3) The protection given to trustees in case of innocent breach of trust by way of—

- (i) limitation of action,
- (ii) indemnity, and
- (iii) excuse,

applies equally in the case of personal representatives.²

¹ 10 Halsbury's Statutes 429. After June, 1940, Limitation Act, 1939, sect. 19.

² For information on these points the reader is referred to Book I, Chapter V.

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